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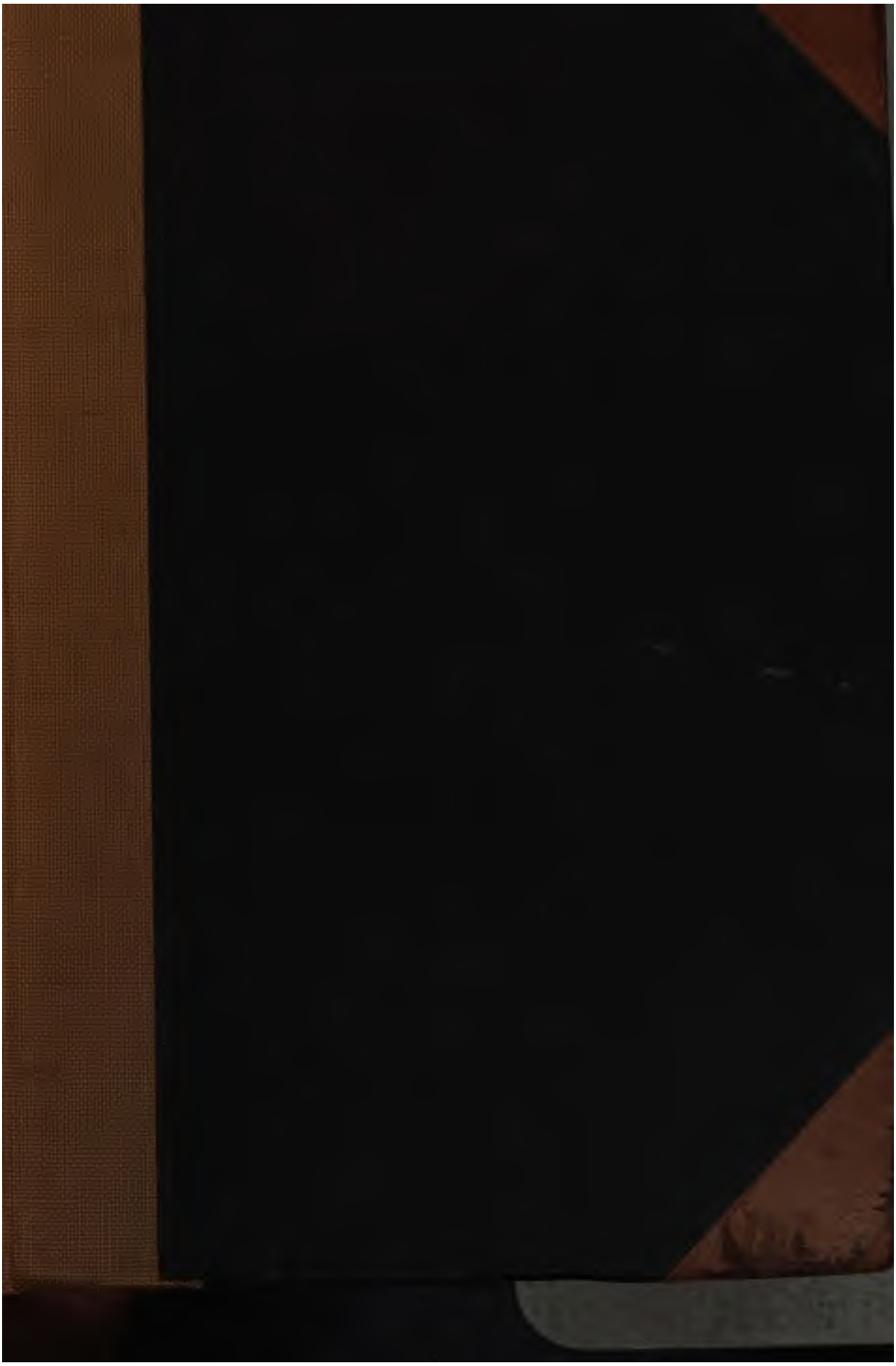

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THE

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LAW REPORTS

OF

CASES

DECIDED BY THE

HIGH COURT, CALCUTTA,

ALSO

JUDGMENTS OF H. M.'S PRIVY COUNCIL.

EDITED BY

G. S. HENDERSON,

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[APPELLATE CIVIL JURISDICTION.]

1880.
Dec. 3*rd*.

No. 230 of 1880.

RAM KISHORE CHUCKERBUTTY AND ANOTHER (JUDGMENT-DEBTORS), ... APPELLANTS;

AND

KALLY KANTO CHUCKERBUTTY (DECREE-HOLDER), ... RESPONDENT.

Civil Procedure Code, Act X of 1877 *Sec.* 234—*Legal Representation of deceased judgment-debtors—Hindu Widow, Decree against.*

A suit by a widow as representative of her deceased husband's estate to recover possession of certain property, the next heirs of her husband being made defendants as having some interest in the property in question, was dismissed with costs.

The widow having died, the defendants sought to execute the decree against the next heir of the husband.

Held, that the next heirs were the "legal representatives" of the widow within the meaning of Section 234 of the Civil Procedure Code and as such liable to satisfy the decree for costs.

In making a decree against a Hindu widow Courts ought to record whether such decree is a personal decree or one against her as representing her husband's estate.

APPEAL from an order passed by the District Judge of Mymensingh, dated the 1st May, 1880 reversing an order of the Moonsiff of Nickly, dated the 14th of July, 1879.

Baboo *Jogesh Chunder Roy*, for Appellants.

Baboo *Bama Churn Banerjee*, for Respondent.

1880.

RAM KISHORE CHUCKERBUTTY v. KALLY KANTO CHUCKERBUTTY.

Judgment.

The facts appear from the judgment of the High Court (1) which was as follows:—

Bissessuri Debya widow of Kristo Kant Chuckerbutty, sued to recover possession of a share in certain property which she claimed as forming portion of her husband's ancestral estate and of which she had been deprived since his death by two of the defendants. The other two defendants were the next heirs to her husband and apparently were joined because they held some other share in the property in suit.

The suit was dismissed with costs in favor of the first mentioned defendants who alone entered appearance.

While execution was being taken out, the widow died and the decree-holders now seek to proceed against the next heirs, the special appellants before us.

The Moonsiff held that they were not liable, but his order has been set aside by the District Judge.

In special appeal it is contended that the Judge has put a wrong construction upon the decree which by its terms purports to be against Bissessuri Debya personally, and that they, special appellants, are not, within the meaning of Sec. 234 of the Civil Procedure Code, "legal representatives of the deceased." In support of this contention thsy cite as an authority the case of *Mohima Chunder Roy Chowdhry*, vs. *Ram Kishore Acharjee Chowdhry*, (15 B. L. R. 142). They also refer to a recent but unreported case decided in special appeal by a Division Bench of this Court. The judgment of Sir RICHARD COUCH in the first quoted case supplies two reasons which militate against the argument of the special appellants. Sir RICHARD COUCH says, "In the present case the debt was not due from the husband and if the estate of the husband is to be charged either for the arrears of rent becoming due after his death or for the bond which was given by the widow, it can only be upon the ground that the debts were necessarily contracted by the widow or under such circumstances as to make the whole estate liable and not merely the interest in it of the person who contracted them." And again, "Here the suits were against the widow only, she cannot be said to have been defending them as representing the reversioner, or as protecting his interest." Now it is manifest in this case from the summary of the plaint which is

(1) MORRIS and PRINSEP, *JJ.*

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Judgment.

embodied in the decree now sought to be executed, that the widow did not seek by her suit to recover any interest personal to herself but that she contracted this judgment-debt in the effort to recover portion of her husband's estate. It was only in her character as representative of that estate that she did, or indeed could have instituted that suit, and any land which she might recover in it would necessarily form portion of her husband's ancestral estate which she enjoyed during her lifetime and to which at her death the special appellants as next heirs have succeeded. But if we had any doubt regarding the nature of that decree it would be removed by the conduct of the reversionary heirs the special appellants, before us. They were made parties to the suit, but made no opposition to the claim of the widow; on the contrary the Judge points out that one of them admitted that he advised the widow in the conduct of the suit. These it seems to us are, to use the words of Sir RICHARD COUCH, "circumstances which make the whole estate liable," and which render this case clearly distinguishable from the one which was then before him.

As to the unreported case referred to, the facts of it are not before us, and it seems to us from the judgment which has been read to us that the learned Judges never intended to decide that under no circumstances could the estate in which a widow has only a life-interest be rendered liable in satisfaction of a decree obtained against her unless such liability was expressly declared in the decree.

It would no doubt be more satisfactory if our Courts were always to be careful in recording whether a decree against a Hindu widow is a personal decree or one against her as representing her husband's estate and chargeable thereon—and such a practice would materially diminish litigation, but in our experience this has not been hitherto the practice of our Courts.

Having regard therefore to these considerations we are of opinion that the decree was against the widow Bissessuri as representing her husband's estate, and that therefore the special appellants as succeeding to that estate by right of inheritance are liable to satisfy that decree as the legal representatives within the meaning of Sec. 234.

We therefore dismiss the appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

1880. *Dec. 9th.*

No. 295 of 1879.

GRISH CHUNDER DAS (PLAINTIFF) ..... APPELLANT;

AND

BROJO JIBUN BOSE (DEFENDANT) ..... RESPONDENT.

Fieri Facias—Sheriff, Jurisdiction of.

Inasmuch as since the establishment of the High Court, or at all events since 1865, a writ of *fieri facias* could not run beyond the High Court's Original Jurisdiction, a sale in execution of a decree by the Mofussil Court of property in the Mofussil will pass a good title to the purchaser notwithstanding that at the time of such sale, the Sheriff was in possession of the property under a writ of *fieri facias* issued subsequent to 1865.

Monomotho Nath Day vs. *Greender Chunder Ghose*, 24 W. R. 366.

APPEAL from a decision of the District Judge of the 24-Pergunnahs, dated the 12th August 1879.

The facts of the case appear from the judgment of the High Court.

Baboo *Aushootosh Dhur* and Baboo *Rajendronath Bose* for the Appellant.

T. A. Apcar and Mr. *Adkin* for the Respondent.

The judgment of the High Court (1) which was as follows, was delivered by :—

PONTIFEX, *J.*

PONTIFEX, *J.*,—In this case a writ of *fieri facias* was issued on a judgment of the High Court dated after the establishment of the High Court. It was issued on the 23rd January 1866, and under it the Sheriff took possession of the land in suit which is situated in the 24-Pergunnahs.

Whilst in possession another judgment of the High Court was transferred to the Court of 24-Pergunnahs, and an attachment of the same land was made under it. Under that attachment a sale was made, and the plaintiff purchased. Following his purchase he took possession by the aid of the Court of 24-Pergunnahs of the land then in the hands of the Sheriff's officer. On doing so a Rule was obtained from the High Court calling upon him to show cause why a writ of attachment for contempt should not issue

(1) PONTIFEX and M'DONELL, *J.J.*

against his person; and the Rule was made absolute on the 14th December 1866. Shortly afterwards, in the same month, that is, December 1866, the Sheriff purported to sell the property to the predecessor in title of the defendant.

The question here is whether the plaintiff is entitled to recover; and that of course depends upon the other questions, whether the Sheriff's proceedings had any validity.

Even if there were no authority, we should hold that after the High Court was established, or at all events after 1865 the writ of *fieri facias* could not run beyond the local limits of the High Court's Original Jurisdiction; and that the Sheriff could not under a writ of *fieri facias* take possession of or sell property in the Mofussil,

Now, the plaintiff having been declared guilty of contempt on the 14th December 1866, he, on the 13th March 1867 to purge his contempt resigned possession to the Sheriff; but on the 13th March 1867 he was actually in possession.

We think that he only resigned possession under compulsion. There was a writ of attachment against his person for contempt of the High Court, and he could not avoid it except by giving up possession to the Sheriff. If he had brought a suit the next day to try the question of title, in our opinion he must have succeeded. As authority for that, if necessary, we may refer to the case of *Monomotho Nath Day* vs. *Greender Chunder Ghose*, 24 W. R., 366; and if he could have succeeded then, we do not see what there can be to prevent his succeeding now. It has indeed been held by the Court below that he is not barred by limitation and against that finding there is no cross appeal.

We think that on the question of title he ought to succeed; and that the Judge in the Court below was wrong in holding that the Sheriff's possession under the *fieri facias* prevented the sale by the Court of the 24-Pergunnahs under the decree transferred to it by the High Court from operating in the usual way.

The decree of the Court below must be reversed and a decree made in favor of the plaintiff with costs both in this and the Lower Court.

[CIVIL APPELLATE JURISDICTION]

1880. Dec. 10th.

No. 143 of 1880.

NEWAJ BANDOPADHYA, (ONE OF THE DEFENDANTS) APPELL

AND

KALI PROSANNO GHOSE, (PLAINTIFF)..... RESPONI

Enhancement—Notice of Enhancement—Onus where, in Enhance Suit, defendant alleges portion of the lands to be rent-free.

In a suit by a zemindar for enhancement of the rent if tenant alleges that portion of the lands held by him is rent- the burden of proving a *primâ facie* case as to this is on the te *Huryhur Mookerjee* vs. *Goomanee Kazee*, Marshall's Report, considered. *Gooroo Persad Roy* vs. *Juggobundoo Mozoo* W R. Spec., No. p. 15, *Nehal Chunder Mistree* vs. *Huree Pe Mundul*, 8 W. R., 183, *Beebee Ashrufoonissa* vs. *Umung M Deb Roy*, 5 W. R. Act X Ruling 48 followed.

A notice of enhancement is not bad by reason of its shewn that portion of the lands the rents of which are sought enhanced are rent-free, but is good as applicable to the remain

THIS was an appeal against the order of the Judicial Com sioner of Chota Nagpore, dated 2nd February 1880, reversing order of the Deputy Collector of Manbhoom dated 5th May 1

Baboo *Bama Churn Banerjee*, for Appellants.

Baboo *Taruck Nath Dutt*, for Respondent.

The facts appear from the following judgment of the Court (1) which was delivered by

GARTH, *C. J.*

GARTH, *C. J.* :—I think that this appeal should be dimis

A suit was brought by the zemindar to enhance the rent certain lands after notice.

The defence in respect of one portion of these lands was, it was lakheraj; and the defendant called two witnesses to p that defence.

The first Court dismissed the suit upon this ground. It that as regards the lands said to be lakheraj, a *primâ facie* had been made out by the defendant that they were lakheraj that the plaintiff had failed to show, that the whole of the la

(1) GARTH, *C. J.* and FIELD, *J.*

suit were rent-paying lands; and as the notice of enhancement was a general one applicable to all the lands in suit, not distinguishing the rent-free from the rent-paying lands, the notice was bad even for the rent-paying portion, and therefore he dismissed the suit, and declined to go into the question of enhancement at all.

The case then came before the Judicial Commissioner on appeal, and he has remanded it to the first Court, upon two grounds:—

1*st*, That as it is admitted that the defendant holds some lands in the plaintiff's zemindary, and pays him an entire rent, he was bound, if he wanted to show that a portion of the lands was not free, to have given some *primâ facie* proof to that effect, showing what particular lands were rent-free, and as the Judicial Commissioner considered, that the evidence offered by the defendant did not make out a *primâ facie* case that any lands were lakheraj, he sent the case back to the Court below, to have the question of enhancement tried. Then 2*ndly*, with regard to the notice, the Judicial Commissioner held that even if the defendant had succeeded in proving a portion of the lands to be lakheraj, still there was no reason why the first Court should not have tried the question, whether the mal lands were liable to enhancement and whether the rent ought to be enhanced.

It has now been contended before us, that the learned Judicial Commissioner was wrong upon both these points.

It was argued that in the case of *Huryhur Mookerjee* vs. *Goomanee Kazee*, Marshall's Reports, 523 it was decided by a Full Bench of this Court, that in all cases where a plaintiff brings a suit for enhancement, the *onus* is upon him to show, that the whole of the lands, the rent of which he seeks to enhance, are rent-paying.

But that case does not decide anything of the kind. There a certain part of the land, the rent of which the plaintiff sought to enhance was assumed by the Lower Court to be lakheraj; and what the Court held was, that the validity or invalidity of the defendant's title to that land could not be tried in that suit. The head note of that case is rather calculated to mislead.

In another Full Bench case *Gooroo Persad Roy* vs. *Juggobundoo Mozoomdar*, W. R. Sp. No., p. 15. It was distinctly held by Sir BARNES PEACOCK and two other Judges, that in a suit for a kabooleat, where the defendant had acknowledged himself to be

1880.

NEWAJ BANDOPADHYA v. KALI PROSANNO GHOSE.

Judgment.

GARTH, *C. J.*

the plaintiff's ryot as to a portion of the lands in suit, tl was on him to prove the defence which he set up, *viz.*, that not the plaintiff's ryot as to the rest of the land.

Sir BARNES PEACOCK in delivering judgment, says :—" " that the defendant admitted that as to a certain portion " land for the rent of which plaintiff sued, he (defendant) hac " a kobooleut or in other words had acknowledged that h " plaintiff's ryot. With this *primâ facie* evidence of the " defendant being plaintiff's ryot, the burden of proving the " plea raised by the defendant of his not being plaintiff's ry " the rest of the land, was clearly upon the defendant, oth " indeed, every ryot might meet every rent case by a fals " of proprietory title."

The same principle appears to have been acted upon in reported in Volume VIII, Weekly Reporter, page 183. Mr. KEMP, who delivered judgment in that case, being one of the who composed the Full Bench in the above case cited from Mar Reports.

And in another case *Beebee Ashrufoonissa* vs. *Umung Deb Roy*, reported in 5 W. R. Act X Rulings, p. 4 learned Judges (SETON-KARR and SUMBHOO NATH PUNDIT held that, " it could never have been the intention of the Full " that a bare allegation of a defendant of a rent-free holdin " to bar the plaintiff; the meaning must have been that " should be some *primâ facie* evidence of an ostensible ren " title in some portion of the land for which rent is sought."

It seems to me, that these decisions are quite conclusive the point which we have to decide; and if the question w open one, I should undoubtedly hold that to be the law; bec think it most unreasonable, where a zemindar sues a tena enhancement, who undoubtedly holds and pays rent for lands his zemindari, that the mere allegation by the tenant, that tion of those lands is rent-free, should throw the *onus* upo landlord of proving what particular portion of the land whic tenant holds is rent-paying.

The *onus* ought to be upon the tenant to prove *primâ* that some and what part of the land is rent-free, and when h done so, the *onus* would then be thrown upon the landlord to such *primâ facie* evidence.

1880.

NEWAJ BANDOOPADHYA v. KALI PROSANNO GHOSE.

Judgment.

Then it is also contended in this case, that the Judicial Commissioner had evidence before him which he ought to have considered sufficient to establish a *primâ facie* case for the defendant. But it was for him to determine whether that evidence was sufficient or not, and I consider it no part of our duty upon this appeal to go into the question of its sufficiency.

Then with regard to the notice, I am clearly of opinion that the Judicial Commissioner was right. Suppose a suit brought to enhance the rent of 100 bighas of land, and a notice given setting out the grounds of enhancement, surely the notice would not be altogether bad, because the defendant might prove that of those 100 bighas he holds 10 bighas rent-free. The notice would be perfectly good, so far as it was applicable to the remaining 90 bighas.

The appeal will therefore be dismissed with costs.

FIELD, *J.* :—

I also am of opinion that the Judicial Commissioner rightly laid the burden of proving a *primâ facie* case of lakheraj holding upon the defendant ryot and I think that it is impossible to say that the evidence of the two witnesses examined amounted to sufficient proof of such a *primâ facie* case.

[CIVIL APPELLATE JURISDICTION.]

1880. *Dec.* 22*nd.* No. 1523 of 1879.

RADHANATH KUNDU, (ONE OF THE DEFENDANTS,) APPELLANT;

AND

LAND MORTGAGE BANK OF INDIA, LIMITED AND OTHERS (PLAINTIFFS,) ..... RESPONDENTS.

Res Judicata,—Act VIII of 1859, *Secs.* 2 *and* 7—*Priority—Mortgage—Civil Procedure Code, Act X of* 1877 *Sec.* 13 *Expl.*

In execution of a decree obtained by the plaintiff, in Sept. 1874, upon a mortgage, dated 8th March 1872, it was objected by A that the property attached had been purchased by him on the 1st August, 1874, in execution of a decree, dated 30th December, 1871. The objection having, on the 10th April 1875, been allowed and the attachment withdrawn, the plaintiff in 1876 brought a suit to set aside the order of 10th April 1875, but this suit failed on the ground that the property was not included in the mortgage.

On the 14th February 1871, prior to any attachment, the original mortgagor had executed a mortgage of the same property and upon this mortgage a decree had on the 28th February 1871 been obtained, which decree had been transferred to the plaintiff, who attached the property. This attachment was also set aside by an order, dated 4th March, 1876 on the objection of A. The plaintiff thereupon sued to set aside the order of 4th March 1876, and to have it declared that the mortgaged property in the hands of A was subject to his decree of 28th February, 1871.

Held, that, although the subject matter of both suits was the same, the present suit was not by reason of the previous suit in 1876 barred under Sec. 2 of Act VIII of 1859 nor by Sec. 7 of the same Act.

Held, also, that the purchase by A in 1874 was subject to the mortgage of 14th February, 1871.

Denobundhoo Chowdhry v. *Kristomohinee Dossee*, I. L. R. 2 Cal. 152 distinguished. *Bemolasoondary Chowdhrain* v. *Puncheu Chowdhry*, I. L. R. 3 Cal. 705 commented on.

THIS was an appeal against the decree of the District Judge of Jessore, dated the 28th April, 1879 affirming the decree of the Subordinate Judge of that District, dated the 29th March, 1878.

1880.

RADHANATH KUNDU v. LAND MORTGAGE BANK OF INDIA, LIMITED.

Judgment.

The facts were as follows :—

On the 14th February, 1871, one Durga Churn Shaha executed a solenamah and mortgage of (*inter alia*) the villages of Shearbar and Parshearbar in favour of one Gouri Pershad. A decree was obtained upon this mortgage on the 28th February 1871 and the rights of Gouri Pershad therein were on the 11th January 1875 purchased by the Land Mortgage Bank which thereupon attached the two villages. Radhanath Kundu the 1st defendant then intervened, claiming to have purchased the villages at a sale in execution of a decree on the 1st August, 1874.

It appeared that this decree had been obtained by Radhanath on the 30th Dec. 1871 upon a mortgage of the same villages and that he had purchased them as he alleged. His claim was on the 4th March, 1876 allowed and the attachment by the Land Mortgage Bank was released.

Thereupon on the 3rd March, 1877 the Bank brought the present suit against Durga Churn and Radhanath to set aside the order of the 4th March and to have it declared that the two villages mortgaged were liable in priority to the claim of Radhanath to satisfy its decree.

It further appeared that the Bank had obtained a mortgage in March, 1872 from Durga Churn and had attached among other properties the two villages in dispute in execution of a decree obtained on that mortgage in September 1874.

The defendant Radhanath on the 10th April 1875 obtained the release of that attachment on the ground as in the other case of his purchase on the 1st August 1874. In June 1876 the Bank brought a suit (No. 39 of 1876) to set aside the order, but failed as regards the two villages on the ground that they were not included in the mortgage.

The Subordinate Judge in the present suit gave the plaintiff a decree, and this decree was affirmed in appeal by the District Judge.

The defendant Radhanath Kundu then appealed to the High Court.

Baboo *Gurjo Sunkur Mozoomdar*, for Appellant.

Baboo *Bussunta Coomar Bose*, for Respondent.

The following judgment was delivered by the High Court (1) :—

Radhanath Kundu the first defendant in this case obtained a decree on the 30th of December, 1870 *ex-parte* against Durga

(1) M'DONELL and BROUGHTON, *JJ.*

1880.

RADHANATH KUNDU v. LAND MORTGAGE BANK OF INDIA, LIMITED.

Judgment.

Churn Shaha the second defendant and on the 1st of January 1871 the property now in dispute was attached in execution of that decree.

The second defendant got the decree set aside on the 20th of March 1871 and the case was re-heard and on the 30th of December 1871 another decree was made against him, in a modified form and the property was again attached in execution of that decree in 1872. Radhanath Kundu purchased the property at the sale in execution on the 1st of August 1874.

Durga Churn Shaha upon the 14th of February 1871 executed a solenamah and mortgage relating to the same property in favor of one Gouri Pershad Kundu, and Gouri Pershad Kundu obtained a decree on the solenamah on the 28th of February 1871. Afterwards Durga Churn executed a separate mortgage.

The Land Mortgage Bank who are the plaintiffs in the present suit bought this decree and mortgage from Gouri Pershad Kundu on the 11th of January 1875.

In execution of the decree so purchased the Bank attached the property in suit, but Radhanath Kundu filed an objection on the 4th of March 1876 and his objection was allowed.

The Bank has therefore instituted the present suit No. 16 of 1877 (the plaint was filed on the 3rd of March 1877) to establish their right under the decree of 28th February 1871 and the subsequent mortgage.

The objections which are put forward in this second appeal on behalf of Radhanath Kundu are two.

1st. That the Bank had already failed in a suit on another mortgage relating to the same property and that as the right they now claim was then in existence they ought to have included it in the other suit and not having done so they are barred under Act VIII of 1859, Sec. 7.

2. That this defendant has priority under his purchase of 1st August 1874.

With regard to the first objection it appears that the Land Mortgage Bank had obtained a decree against Durga Churn Shaha, on another mortgage in execution of which decree the same property was put up to sale.

Radhanath Kundu objected to the sale on the ground that he had purchased the property on the 1st of August, 1874 and

the 10th of April, 1875 his objection was allowed. Thereupon the Land Mortgage Bank on the 30th of June, 1876 filed a suit which was numbered 39 of 1876 against Radhanath Kundu and Durga Churn Shaha. They succeeded in this suit only partially; they failed with regard to the property now in dispute.

This suit No. 16 of 1877 was instituted when Act VIII of 1859 was in operation—and consequently Explanation II of Section 13 of the present Code does not directly apply to it. But it is argued that that Explanation merely expresses in a few words the result of the decisions upon Sec. 2 of Act VIII of 1859—which are to be found in the reports of Indian Appeals. See *Sremut Rajah Taver* v. *Katama Natchiar*, 11 M. I. A. 50 and *Woomatara Debia* v. *Unnopoorna Dassee*, 11 B. L. R. (P. C.) 158. These decisions were discussed in the case of *Denobundhoo Chowdhry* v. *Kristo Mohinee Dassee*, I. L. R. 2 Cal. 152 by a Full Bench the majority of which held that two suits for possession of the same land could not be brought, although the title set up in the first suit was not the title set up in the second. The principle followed in *Bemola Soondury Chowdhrain* v. *Punchanun Chowdhry*, I. L. R. 3 Cal. 705 thus laid down has been since applied to suits to recover a specific sum of money—*Bheeka Lall* v. *Bhuggoo Lall*, I. L. R. 3 Cal. 23. But the suit No. 39 of 1876 was a suit brought with the object of having the property sold in execution of one decree after an order had been made on the 10th of April 1875 releasing the property under Sec. 246 of Act VIII of 1859 on the claim of Radhanath Kundu.

The present suit No. 16 of 1877 is a suit brought with the object of having the property sold in execution of another decree after another order had been made, in separate proceedings in execution, on the 4th of March 1876 under the same section.

The property to be sold is indeed the same, but in no other respect is there any identity between the suits, and we are of opinion that even the very strict interpretation put upon the decision of the Judicial Committee by the Full Bench of this Court in the case of *Denobundhoo Chowdhry* does not make the principle laid down applicable to this case; so that Sec. 2 of Act VIII does not in our view of the case bar this suit, nor do we think that it was incumbent upon the plaintiff to include both claims in one suit under Sec. 7.

1880.

RADHANATH KUNDU v. LAND MORTGAGE BANK OF INDIA, LIMITED.

Judgment.

We are also of opinion that the Lower Court rightly held that the purchase by the defendant in 1874 was a purchase subject to the mortgage of the 14th of February 1871. The property had been attached indeed prior to that mortgage and if the defendant had purchased under that attachment the case would have been difficult. But the *ex-parte* decree under which the property was first attached had been set aside—not only had the decree been set aside but the attachment had been withdrawn. It was under a subsequent attachment under a subsequent decree that the defendant purchased, and he cannot set up his purchase as against the earlier encumbrance of the 14th of February 1871.

We think, therefore, that this appeal must be dismissed with costs.

[INSOLVENCY JURISDICTION.]

1881. IN THE MATTER OF RAM PAUL SINGH, ... INSOLVENT.

Insolvent Act—Stat. 11 *and* 12 *Vict. c.* 112 *S.* 5—*Residence within Jurisdiction—Jurisdiction—Act X of* 1877, *chap. XX.*

A's zemindary and dwelling house in the District of D having been sold, he came to Calcutta in May 1880 leaving his family with his relations and filed his petition in the Court for the relief of Insolvent Debtors in July. He remained in a hired house at Calcutta till September, when the Court rose for the vacation and returned just before the end of the vacation, having in the interval gone to the District of D to raise funds to carry on his insolvency proceedings. He had no residence outside the jurisdiction of the High Court.

Held, that he had no residence within the jurisdiction of the High Court within the meaning of Sec. 5 of the Insolvency Act.

FROM the evidence of the Insolvent it appeared that he was formerly a zemindar and lived at Futtehpore in the Bhagulpore district where his zemindary was situated. In the early part of 1880 his zemindary and dwelling house were sold under a mo

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RAM PAUL SINGH.

age decree obtained by creditor No. 1 in the schedule, and the Insolvent thereupon in May 1880 came down to Calcutta, and lived at No. 7 Gungaram Sen's Street in a hired house for which he paid a monthly rental of Rs. 24. He remained there from May 1880 till the middle of September 1880 when the Courts rose for the vacation. He then, as he states, left Calcutta for the purpose of obtaining funds to carry on his Insolvency proceedings, and during his absence visited various of his friends. He returned to Calcutta early in November of the same year shortly before the opening of the Courts and had been since living in a hired room in Burra Bazar within the jurisdiction. The wife of the Insolvent on his first coming to Calcutta had gone to live with her father, within the Bhagulpore District, where she still was. Insolvent stated that his object in coming to Calcutta was to file his petition in Insolvency and to try and obtain employment; he also stated that he had now no dwelling house or place of residence outside the jurisdiction of this Court. He filed his petition on the 31st July 1879.

Sale for the Insolvent:—The residence for more than three months in Calcutta was sufficient to give the Court jurisdiction. The Insolvent had lived in Calcutta for two months before he filed his petition and remained there for nearly two months after that time. That showed a *bonâ fide* intention to stay in Calcutta at the time the petition was filed. That he came to Calcutta with the object of filing his petition was no objection to his residence. *Massey* v. *Burton*, 27 L. J. Exch. 101: *In Re Tietkins*, 1 B. L. R. O. C. 84.

In the latter case on the facts it was held that the Court had no jurisdiction, but there it appeared that the Insolvent had a residence at Cawnpur which he had not abandoned. Here it is clear that the Insolvent had no residence outside the jurisdiction, and he has every motive to establish a residence within the jurisdiction.

His leaving Calcutta during the vacation under the circumstances alleged does not it is submitted affect the *bonâ fide* nature of his residence within the jurisdiction at the time of filing his petition.

Mr. *Beeby*, attorney for the opposing Creditor was not called upon.

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BROUGHTON, J.

BROUGHTON, *J.*—after stating the facts, continued—

It appears to me I have no jurisdiction to entertain the petitic Some of the facts in this case resemble those in *In re Tietkins*. T petitioner there came to Calcutta for the purpose of filing l petition but left Calcutta a few days after doing so. In this c the petitioner came to Calcutta in May and stayed here till t middle of September when the Courts rose, and did not retu until just before the Courts re-opened. It is to be remembe that *In re Tietkins* was decided at a time when the Mofussil Cou had no Insolvency jurisdiction. Act X of 1877 gives them tl jurisdiction, and I do not think it is intended, nor is it desira that people should come down to Calcutta for the purpose of filii their petitions, when they may file them in a Mofussil Cou The petitioner lived until he came to Calcutta in the Bhagulp district, and it seems his wife is still living there. Creditor No. who is a creditor for a substantial amount, opposes. The rest of t creditors are silent, but it may be they are too poor to come to th Court to oppose. I do not think a residence within the meani of Sec. 5 of the Insolvent Act has been shown, and therefore th Court has no jurisdiction.

The petition must be dismissed, and the petitioner must p the opposing creditor's costs.

[CIVIL APPELLATE JURISDICTION.]

NOOR JEHAN BEGUM, DECREE-HOLDER,..... APPELLANT;
AND
MASHITTY KHANUM, AND ANOTHER, ... RESPONDENTS.

1880.
Dec. 22*nd*.

No. 221 of 1880.

Civil Procedure Code, Act X of 1877 *Secs.* 272, 277—*Attachment of property—Discretion of Court as to Attachment.*

The Court has no discretion to refuse an application, for attachment of property in Court, made under Sec. 272 of the Civil Procedure Court.

THIS was an appeal against the order of the First Subordinate Judge of Bhagulpore dated the 8th May 1880.

The appellant in the case applied by petition to have a sum of Rs. 34,814, the surplus proceeds of the sale of a certain mouzah, which were in deposit in the Collector's Court at Monghyr, attached and to have portion of that sum paid to her.

She alleged that the real proprietors of the mouzah sold were her judgment-debtors and that the name registered in the Collector's book was that of their servant.

The Court refused, in the absence of the judgment-debtors, to allow the attachment.

This appeal was thereupon preferred to the High Court.

Munshee *Muhammad Yusuf*, for the Appellant.

No one appeared for the Respondents.

The judgment of this High Court was as follows (1) :—

We think that in this case the Subordinate Judge was not right in refusing to attach the money in deposit with the Collector. The plaintiff, decree-holder alleged that although the name of Nujuf Ali is on the Collector's register, the real proprietors are his judgment-debtors, and upon that allegation he made the applica-

(1) MITTER and MACLEAN, *JJ.*

1880.

NOOR JEHAN BEGUM v. MASHITTY KHANUM.

tion in question for the attachment of the money. We do think that the Subordinate Judge has any discretion under Se 272 either to grant or to refuse the application, but, no d under Section 277 of Act X of 1877 he is vested with discr either to direct or not to direct that a portion of the money attached should be paid over to the decree-holder. In this under the circumstances now existing we think that the Su dinate Judge should refuse, under the last mentioned Sectio make any order directing any portion of the money to be paid, he was bound upon the application of the decree-holder to at the money.

We, therefore, set aside his decision and remand the ca order that the money may be attached.

There will be no costs of this Appeal.

[CIVIL APPELLATE JURISDICTION.]

KADUMBINI DASSEE (JUDGMENT-DEBTOR)..... APPELLANT;

AND

KOYLASH CHUNDER PAL CHOWDHRY, (DECREE-HOLDER) ..... RESPONDENT.

1880. *Dec.* 22*nd*.

No. 262 of 1880.

Act VIII (B. C.) of 1869, *Sections* 5, 27, 28, 29, 30, 58—*Limitation—Execution of Decrees in Rent Suits.*

Application having been made in December 1877 for the sale of moveable property of the judgment-debtor which had been attached in execution of a decree passed in June 1876 in a rent suit under Act VIII (B. C.) of 1869, it was, on the 13th March 1878, directed that the judgment-creditor should proceed against the tenure in respect of which the decree had been made, and on the 15th March the attachment was withdrawn. Although the amount of the decree and the costs were under Rs. 500, the judgment-creditor, on the 19th August 1879, again applied for execution, treating the decree as for an amount exceeding Rs. 500, the costs of an appeal being added to the costs originally directed by the decree.

Held, distinguishing the cases of *Deodhary Singh v. Kunwar Dowlut Ram*, 3 C. L. R. 189, and *Golami Sahu v. Chutterbhooj Patuck*, 3 C. L. R., 261, that the application was barred under Act VIII (B. C.) of 1869, section 58, the attachment and execution proceedings not having been allowed to subsist.

Held, further, that the costs of appeal could not be added to the costs under the original decree so as to bring the case within the latter portion of section 58 of that Act.

APPEAL from an order of the District Judge of Nuddea dated the 8th of July 1880, affirming the order of the Moonsiff of Ranaghat dated the 15th April 1880.

Baboo *Hurry Mohun Chowdhry*, for Appellant.

Baboo *Rash Behary Ghose*, for Respondent.

The facts are fully stated in the following judgment of the High Court (1) which was delivered by :—

BROUGHTON, *J.* :—

BROUGHTON, *J.*

The question in this case arises in the construction of Section 58 of Act VIII of 1869 (B. C.) which enacts as follows :

(1) McDONELL and BROUGHTON, *JJ.*

1880.

KADUMBINI DASSEE v. KOYLASH CHUNDER PAL CHOWDHRY.

Judgment.

"No process of execution of any description whatever s be issued on a judgment in any suit for any of the causes of act mentioned in Secs. 27, 28, 29 or 30 of this Act, after the la of three years from the date of *such judgment* unless the judgm be for a sum exceeding five hundred Rupees, in which case period within which execution may be had shall be regulated the general rules in force in respect to the period allowed for execution of decrees of the Court."

It appears that the decree in the present case was for 375 odd annas, and costs which according to the schedule annexed the decree amounted to 60 Rs. odd annas.

Execution was not applied for until December 1877, altho the decree was passed in June 1876, and the application for the sale of the judgment-debtor's moveable property. objected to this, contending that the decree ought to be execu in the first instance by the sale of the tenure, notwithstanding fact that the tenure had already been sold in execution of anot decree against him. His objections, however, prevailed. decree-holder appealed and the Appellate Court reversed the d sion, and the decision of the Appellate Court was upheld by Court in second appeal on the 26th February 1879.

When the first Court allowed the objections it released moveable property from attachment, (this was on March 13th 18 and it directed the creditor to proceed within two days against tenure. He did not do so, and consequently the whole proceed in execution was struck off on the 15th of March.

The next application for execution was made on the 19t August 1879, after which there appears to have been some furi delay and another application was made on the 20th of January 1

Execution has been allowed to proceed by the Court of instance and by the Judge on appeal, and this is a second ap against the decision of the Judge.

There is some confusion in the case owing to the judgmen the Court of first instance deciding the case with reference to application of the 19th August 1879 although the case (whic called No. 35 of 1880) apparently refers to the application January 1880.

This is, however, immaterial because if the application August 1879 was out of time so was that of Jannary 1880.

1880.

KADUMBINI DASSEE v. KOYLASH CHUNDER PAL CHOWDHRY.

Judgment.

for the validity of the execution in the present case where there has been considerable delay. The case of *Lalla Ram Sahoy* is more in point, but in this case the execution was made within time and an order was made for the sale of the property to take place on the 21st of November 1871, the decree being dated the 3rd of September 1868. On consent of the parties and on a petition of the judgment-debtor dated the 18th of November 1871, the sale was stayed for 2 months. This period expired in February 1872 but the judgment-creditor waited until April 1872, when it was held that his application came too late. Here also the attachment was not removed although the sale was stayed. *A fortiori* the application in the present case was out of time.

The precedent also disposes of the objections that the question of due diligence cannot be gone into on a second appeal, for it was a case of a second appeal, and indeed no question of fact is involved in these cases. The facts are found, the only question is whether on those facts the creditors can be considered to have used due diligence. A further objection has been raised in this case on behalf of the creditors. He contends that the judgment cannot be held tocome within the meaning of section 58 of the Rent law because the costs of the appeals from the first order of the lower Court ought to be added to the amount of the judgment. The case of *Campbell* vs. *Hue*, 6 W. R., 8 was cited in support of this argument. In that case it was held that the costs of, and incidental to, the execution ought to be added. This conclusion was arrived at by applying to the case the definition of costs to be found in Section 188 of Act VIII of 1859, now repealed. The interpretation was a wide one, but it did not go so far as is contended in the present case, but only so far as to add the costs of stamps &c. in the execution proceedings. The 188th Section could not have been read to include the costs of appeal, in the costs of the original suit spoken of in Section 187 for such costs are in the discretion of the Appellate Court and not of the Court which passed the original judgment.

On these grounds I think that the execution in the present case was barred by lapse of time, and that the appellant judgment-debtor is entitled to succeed.

[ORIGINAL CIVIL JURISDICTION.]

AUSHOOTOSH DUTT, ...

AND

DOORGA CHURN CHATTERJEE,.....

1880.
Dec. 10th.

No. 1088 of 1864.

Limitation Act XV of 1877, *Schedule II, Art.* 180—*Revivor—Civil Procedure Code Act X of* 1877, *Sections* 230, 245 *and* 248—*Act VIII of* 1859, *Sections* 215 *and* 216—*Scire Facias.*

A decree having been obtained in 1864, the first application for execution was made under Section 215 of Act VIII of 1859 on the 18th September 1869, when an order was made for a writ of attachment to issue against the person of the judgment-debtor. On the 15th September 1880 another application was made, under Section 230 of the new Civil Procedure Code, Act X of 1877, for execution.

Held, that the order under Section 215 of Act VIII, which must be assumed to have been on notice, had the effect of reviving the judgment within the meaning of Article 180, Schedule II, of Act XV, of 1877, and that the application was not barred.

An order for execution under the Code of Civil Procedure made after notice has, on the Original Side of the High Court, the same effect of reviving a judgment as a *scire facias* had.

Section 230 of Act X of 1877 only applies where the previous application for execution was actually made under that Section.

RULE to show cause why a certain decree should not be executed.

In this case the plaintiff on the 15th of September last obtained a rule calling on the defendant to show cause why a decree should not be executed.

The decree was for money, and was obtained in the High Court as far back as the 16th of November 1864. The first application for execution, as appears by the plaintiff's verified petition, was made in September 1869, when the High Court on the 18th of that month ordered a writ of attachment to issue against the person of the defendant. After several fruitless attempts to execute this and other subsequent similar writs, the plaintiff ultimately succeeded in arrest-

1880.

HOOTOSH DUTT v. POORGA CHURN TTERJEE.

atement.

ing the defendant on the 28th of January 1873. The defend lay in jail for 2 years without satisfying the decree, and at the of that time was released under the provisions of the Code of 18 which limited imprisonment under a decree to two years.

In the meanwhile the plaintiff had the decree transmitted execution to the District Court at Hooghly; and that Court, u an application made on the 20th of August 1874, ordered the rig title and interest of the defendant in certain property within jurisdiction and in the possession of the defendant to be attached.

When this was done, the defendant and his brother prefer a claim on the ground that the property attached was debutter p perty. The claim was disallowed and the defendant and his brot on the 4th December 1874 brought a suit to establish that the p perty was debutter and therefore not liable for the defendant's de This suit was carried through the various Courts of this coun to the Privy Council, where it was finally decided on the 6th of J 1877 that the defendant had, subject to the trusts for the Idol saleable interest in the property attached. This interest was acco ingly sold in July 1880 and realised Rs. 273-11. With the exc tion of this sum, no money has been realised by the plaintiff un the decree, and the balance now due is Rs. 11,977-7 annas.

The plaintiff having as he alleges recently ascertained that defendant possessed some immoveable property within the jurisd tion of the High Court, on the 15th Sept. 1880 procured the dec to be brought back to that Court and the present rule to issue.

T. A. Apcar shewed cause.

Kennedy and *Bonnerjee* in support of the Rule.

T. A. Apcar contended that the application was barred un Section 230, Cl. (*a*) of the Code of Civil Procedure, 12 years hav elapsed since the date of the decree. There had been no fraud or fo on the part of the judgment-debtor to bring the case within proviso to that Section.

He further contended that the application was barred un Article 180, Schedule II of Act XV of 1877 in as much as the righ enforce the decree had accrued more than 12 years previously, there had been no revivor, payment, or acknowledgment, from date of which a fresh period of limitation would arise. The ap made on the 18th September 1869 did not give a fresh departu it being a mere continuation of the proceedings.

1880

AUSHOOTOSH DUTT v. DOORGA CHURN CHATTERJEE.

Statement.

Kennedy contended that the case was met by the provisos to Article 180, Schedule II of the Limitation Act.

There had been both payment and revivor. It was not necessary that in order to give a fresh period of limitation, that a payment made to the judgment-creditor should be voluntary. It was sufficient that the judgment-creditor should have received payment of portion of the debt due under the decree; and that was the case here.

The proceedings of 18th September 1869 operated as a revivor of the decree within the meaning of the proviso to Article 180. The order which was made more than a year after the decree must be taken as having been made in proceedings under Sections 215 and 216 of Act VIII of 1859 which followed the procedure by writ of *scire facias* of the late Supreme Court.

Now, the effect of a *scire facias* upon a judgment, was to create a new right. The *scire facias* was not a mere continuation of a former suit—*Farrell* v. *Gleeson*, 11 Cl. and Fin. 702. *In the matter of Blake*, 2 Ir. Ch. Rep. 643. See Tidd's Practice, Vol. II, p. 1103.

The procedure laid down by sections 215 and 216 of Act VIII of 1859 had been preserved under sections 245 and 248 of the present Code, and the provisions of Article 180, Schedule II of Act XV of 1877 merely re-enacted Section 19 of the Limitation Act of 1859.

Section 230 of the Civil Procedure Code, he submitted, did not apply, for these proceedings were commenced after decree and were still pending on the 1st October 1877—see Act X of 1877 Section 3, as amended by Act XII of 1879. Moreover the former application was not made under section 230, and that Section only applied when a former application has been made under it—see *Byraddi Subbareddi* v. *Basappa Ram*, I. L. R. 1 Mad. 403. *Sohan Lal* v. *Kariny Buksh*, I. L. R. 2 All. 281. *Ram Kishen* v. *Sedhu*, I. L. R. 2 All. 275.

T. A. Apcar was heard in reply.

The following judgment was delivered by

WHITE, *J.*:—(after stating the facts as above) The decree is more than 12 years old, and, that being so, execution would be barred under Article 180, Schedule II of the Indian Limitation Act

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HOOTOSH DUTT v. DORGA CHURN TTERJEE.

dgment.

IITE, *J.*

1877. But Mr. Kennedy for the plaintiff has contended with m ability and learning that the order of this Court of the 18th September 1869 was a revivor of the decree within the mean of the proviso attached to the foregoing article, and which is these words: "Provided that when the judgment or decree been revived ..... the 12 years shall be computed from the d of such revivor or the latest of such review."

The petition does not state how the order of the 18th of S tember 1869 came to be made. But it was made long after Code of 1859 had been applied to this Court on its original side. also appears to have been the first order for execution which iss upon the decree, and to have been made after the lapse of more t a year from the date of the decree. So I must take the orde have been made under Sections 215 and 216 of the Code of 1859 therefore after notice to the defendant to shew cause why the de should not be executed against him.

The corresponding Sections to these in the Code of 1877 Sections 245 and 248, the latter of which enacts that notice to s cause must issue "if more than a year has elapsed between the of the decree and the application for its execution."

In neither of the Codes is an order for execution made a notice under these foregoing Sections, described as reviving decree. The question is whether it has that effect and is what Legislature had in mind when it speaks in the present Limita Act of the revivor of a decree.

The proviso in question is a transcript of one in the repe Limitation of 1871, and in tracing back to its source the langu used in the proviso, we find the words first used in Section 1 Act XIV of 1859 which enacts that "no proceeding shall be brot to enforce a judgment or decree of a Court established by R Charter but within 12 years from the decree unless in the mean such decree shall have been duly revived.....and in such cas proceeding shall be brought to enforce the decree but withi years after such revivor or the latest of such revivors."

This was the first Limitation Act of the Legislature of I which applied to the Chartered Courts at the three Presidencies

In 1859 these Courts were governed by their own Proce It was part of that procedure that execution could not issue u

1880.

AUSHOOTOSH DUTT v. DOORGA CHURN CHATTERJEE.

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judgment more than a year old without suing out a writ of *scire facias* against the defendant. The 195th of the repealed rules of 1851 on the Plea side of the old Supreme Court of Calcutta recognises the procedure to be such.

The writ of *scire facias* was introduced into the Chartered Courts from the English law and that law governed its operation and effect. By the common law of England in the case of judgments in personal actions if more than a year and a day passed without execution, the plaintiff's only remedy was an action of debt upon the judgment. The Statute of Westminster 2 (13 Edward 1) chap. 45 gave the plaintiff the alternative remedy of suing out a *scire facias* (4 Comyn's Digest, Execution Section 4, Tidd's Practice, p. 1102.). The effect of an award of execution in pursuance of the *scire facias* was to revive the judgment. It is so stated in Tidd's Practice, p. 1103 and the point is placed beyond controversy by *Farrell* vs. *Gleeson*, 11 Cl. and Fin., 702 and *Re Estate of Walter Blake*, before the Judicial Committee of the Privy Council in Ireland, reported in 2 Irish Chancery R. p. 643. These cases decide that *scire facias* upon a judgment is not a mere continuation of a former suit but creates a new right. It would appear from Tidd's Practice, p. 1106 citing a case from 2 Salkeld 598, that although subsequent writs of *scire facias* may be taken out and it may be necessary to take them out, it is the first *scire facias* which revives the judgment. It is unnecessary, however, to determine in this case how that may be, as the first order for execution in the present case is less than 12 years old.

There was, then, at the date when the Limitation Act of 1859 came in force a proceeding in the Supreme Court which had unquestionably the effect of reviving a judgment.

This proceeding has since been displaced by a new proceeding which in substance is the same as the old proceeding. It commences with a notice to shew cause why the decree should not be executed, and terminates with an order for execution which is tantamount to the award of execution under the *scire facias*. In as much as the Legislature has, notwithstanding the change in procedure, retained in the present Limitation Act the language of the Act of 1859 and prescribed a fresh point of depar-

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lgment.

IITE, *J.*

ture of 12 years in the case of a judgment that has been rev ed and inasmuch as I am bound to give effect, if possible, to ev part of the language of the Legislature in the Limitation Act must hold that an order for execution under the Code, made af notice to shew cause, has on the original side of this Court t same effect of reviving the judgment as the *scire faci* had.

It is contended for the defendant that though the order of t 18th of September 1869 may have revived the judgment, I a precluded from granting the present application by that part Section 230 of the Code now in force which prohibits this Co from granting, except under certain circumstances, a subsequ application where the decree is more than 12 years old.

Section 230 of the Code as it stood when the Code w passed in 1877, prohibited the granting of a subsequent applicati for execution of a decree more than 12 years old unless the Co was satisfied that due diligence had been used to obtain satisfacti under the previous order for execution.

As the Section now stands, amended by the Act of 1879, prohibits the grant of a subsequent application; no matter wh diligence may have been used, unless the judgment-debtor has fraud or force prevented the decree from being executed within 12 years. The consequence is, that if from the mere impecunio of the judgment-debtor a decree remains unsatisfied for 12 ye no further order for execution can be made.

No fraud or force has been proved to exist in the present c but Mr. Kennedy argues that this part of Section 230 only appl where the previous application for execution was actually m under Section 230 and not where, as here the previous applicat was made under the Code of 1859.

The language employed in Section 230 is this "where application to execute a decree has been made under this Sect and granted: no subsequent application to execute the same de shall be granted after the expiration of 12 years &c."

The natural meaning of the foregoing language is that previous application must be one made under Section 230. Kennedy has cited two cases—one in the Madras High Cour *Byraddi Subbareddi* v. *Basappa Ram*, I. L. R., 1 Mad., 403;

[CIVIL APPELLATE JURISDICTION.]

1880. Nov. 23rd.

BHUPENDRA NARAIN ROY (PETITIONER),..... APPEL

AND

No. 197 of 1880.

GIRISH NARAIN ROY AND ANOTHER,..... RESPO

Act XXXV of 1858—*Custody of a Lunatic—Guardian of L Duties of—Mitakshara Law—Practice.*

Before any action can be taken under Act XXXV of strong case should be made out that such action would be lunatic's benefit.

The custodians of a lunatic and the managers of his estate furnish accounts of the management of the property at the of the natural heir of the lunatic.

SEMBLE, that under certain cases Act XXXV of 1858 apply to a member of a Mitakshara joint family.

THIS was an appeal against the order of the District Ju Moorshedabad dated 7th April 1880.

Baboo *Hem Chunder Banerjie,* Baboo *Guru Das Ba* Baboo *Grish Chunder Chowdhry,* and Baboo *Saroda Prosad C* for the Appellant.

Baboo *Mohesh C. Chowdhry* and Baboo *Mohiney Mohun R* the Respondents.

The facts appear from the judgment of the High Co which was as follows :—

The District Judge in this case has refused to gr application under Act XXXV of 1858 to declare that one Ka Roy is a lunatic and to appoint a manager of his estate and dian of his person. The application was made by the hu of the lunatic's daughter. The family is a Mitakshara and consequently the daughter would not inherit the inte her father in the ancestral property. The Judge has foun in reality the application has been made with a view to t subsequent proceedings for partition. Now it appears, acco

(1) PONTIFEX and MCDONELL, *JJ.*

1880.

BHUPENDRA NARAIN ROY v. GIRISH NARAIN ROY.

Judgment.

recitals in the various documents put in, and in an admission made by one of the nephews in his examination. We think that the admission does not go far enough. It was a mere statement that in consequence of litigation and numerous lawsuits to which the family was subjected, the debt had so increased that it was necessary to raise a considerable sum of money. Now, with respect to the supposition of the Judge that these proceedings were taken with the intention of ultimate proceedings for a partition, without deciding whether or not a partition could be bad under such circumstances if the lunatic were declared a lunatic under the Act, it may be not improper to refer to the policy of the Lunacy enactments in England. Under these Acts it has always been the policy of the Legislature not to interfere with the course of inheritance of the lunatic's property, and provisions for that purpose have been inserted into these Acts, so that, even where it is necessary for payment of debts or otherwise, that the lunatic's real property should be sold, it is provided that the surplus monies should be considered as in the same condition as if invested in land, leaving them heritable as if they were land. Possibly, therefore, even if an application for partition were made it might be refused in accordance with that policy.

One difficult question, however, remains and that is with respect to the property which was inherited from collaterals. It seems to us that that property, if it vested in the lunatic, might be on a different footing altogether from strictly ancestral property, and that the lunatic might be entitled to a separate share in that property; and, if so entitled, his daughter might be his heir and it might be material that a manager should be appointed for it. But the circumstances relating to that property are as follows:—Before his lunacy, as we must assume, Kasinath had made a hiba of his share of the ancestral property as also of his share of the collaterally inherited property to his wife. That hiba had been in operation until about the year 1280, when the High Court held that so far as it related to ancestral property it was void. And subsequently the wife relinquished her interest under the hiba in consideration of the nephews paying her the monthly sum of Rs. 150. Now, if the hiba passed the lunatic's interest in the property inherited from collaterals, then there is nothing before

w that such interest became revested in the lunatic, and these circumstances of doubt we think we ought not to allow ct to be put into operation, but that it ought to be left for tural heir of the lunatic, if so disposed to institute a suit as riend of the lunatic, to have that matter cleared up. If such is instituted, and if it shall appear that this property is te property belonging to the lunatic, then, if necessary, a r application might be made under the Act. But we wish rve that the nephews who now as members of the joint ded family have the custody of the lunatic, and are managing tate, ought, in our opinion, when requested thereto by the ter of the lunatic as the natural heir, to produce and furnish ith accounts of the management of the property. We think ld be sufficient if such accounts were produced yearly. If ccounts are refused, or if the lunatic's daughter is refused access to him, then a case might perhaps be made which influence the Court to interfere under the Act. At present of opinion that no sufficient case has been made, but under rcumstances we think there ought to be no costs of this ation.

[CIVIL APPELLATE JURISDICTION.]

1880.
Nov. 22nd.

No. 217 of 1880.

KALLY MOHUN BAL AND OTHERS (DECREE-HOLDERS), ... APPELLANTS;

AND

DINONATH CHUCKERBUTTY CHOWDHRY AND OTHERS (JUDGMENT-DEBTORS), ... RESPONDENTS.

Execution of joint decree Court—Power of.

In executing a joint decree against several debtors, it is not open to a Court to stay the sale of the property of certain of the debtors, upon their offering to pay what they consider their share of the amount due under the decree; nor can a Court, in such a case, upon proper action taken by the judgment-creditor refuse to attach and sell the property of any one of the judgment-debtors in satisfaction of the entire judgment debt.

The liabilities of joint debtors as amongst themselves if not settled privately can be determined only in another suit.

THIS was an appeal against the orders of the Sub-Judge of Mymensingh dated the 20th of April 1880 and 4th May 1880.

Baboo *Hurry Mohun Chuckerbatty*, for the Appellants.

No one appeared for the Respondents.

The facts in so far as necessary appear in the judgment of the High Court (1) which was as follows:

MORRIS, *J.*:—The decree in this case, which the decree-holder seeks to execute, is one which makes ten judgment-debtors jointly liable in respect of certain mesne profits and costs, and empowers the decree-holder to realise the full amount due under it from any one of the judgment-debtors, leaving them to adjust as amongst themselves their respective liabilities. The decree-holder attached and endeavoured to sell the property of five of the judgment-debtors. On the day of sale, one of them deposited, what he stated to be, the amount of the share due by him, and the other judgment-debtors whose pro-

(1) MORRIS & PRINSEP, *JJ.*

[APPELLATE CIVIL JURISDICTION.]

1881. *Jan.* 19*th.*

No. 189 of 1880.

BALA MAHOMED, (DECREE-HOLDER)..... APPELLA

AND

C. R. WEBB, (JUDGEMENT-DEBTOR)..... RESPONDE

Civil Procedure Code Act X of 1877, *Secs.* 244 *and* 258—*Adjustment of Decree—Execution Proceedings.*

Section 258 of the Civil Procedure Code Act X of 1877 does n apply to money decrees only,—but deals with the adjustment of a decree. Accordingly, where in execution of a decree by which t decreeholder was declared to be entitled to a specific share, allotted partition, in certain land, it was objected by the judgment-debtor th the decree-holder had already obtained possession, and had grant him a lease of the land covered by the decree, it was *held* that t objection could not be entertained, inasmuch as it alleged an adju ment of the decree which had not been certified to the Court und Sec. 258 of the Civil Procedure Code, and therefore could not recognized.

It was further *held* that Sec. 244 of the Code did not apply.

APPEAL against an order passed by the Officiating Judge Rungpore, dated 25th March 1880 reversing the order of t Moonsiff of Julpaiguri dated the 27th January 1880.

The decree in this case was made in 1876 but no execution p ceedings were taken until 1878. The decree was for possession o specific portion of certain land allotted on partition. In the cours execution, on the 20th November 1879 the decree-holder was put possession. The appellant, the judgment-debtor, thereupon objec that in 1877 it had been arranged between him and the decree-hol that the particular land should be rented by the former, and a pot was accordingly granted. Registration of this pottah had b directed but owing to the burning of the Julpaiguri Governm Offices no registration took place.

The Moonsiff declined to interfere being of opinion that n Secs. 244 nor 258 of the Civil Procedure Code applied to the ca

1881.

BALA MAHOMED v. C. R. WEBB.

Judgment.

On appeal, the District Judge by his order demanded the case directing the Moonsiff, under section 244, to consider the objection raised.

Against this order the present appeal has been preferred to the High Court.

Baboo *Hurry Mohun Chuckerbutty*, for the Appellant.

Baboo *Grija Sunkur Mozoomdar*, for the Respondent.

The judgment of the High Court (1) which was as follows was delivered by

MORRIS, *J.*:—The question before us relates to an alleged adjustment of a decree which was obtained on the 18th March 1876, and affirmed on appeal on the 16th August of the same year.

MORRIS, *J.*

The decree-holder was declared by the decree entitled, on partition, to a specified share of certain immoveable property and to be put in possession of the same. He took out execution in September 1878, (whereby this case comes under the provisions of Act X of 1877 as originally framed) and he was put in possession under the decree on the 20th November 1879. Thereupon the judgment-debtor objected that in January 1877 the decree-holder had obtained satisfaction of the decree, and that this was evidenced by a lease of the land covered by the partition decree which the decree-holder had given to him on that date.

The first Court declined to take this lease into consideration or to interfere with the possession that had been given to the decree-holder.

The Judge on appeal decided that whether Section 258 of the Civil Procedure Code applied or not, this was a matter which the Moonsiff should have enquired into under Section 244. And he accordingly remanded the case to him to do this. It is against this order that the present appeal is preferred.

It seems to us that the Moonsiff was right in refusing to consider the matter of the lease in connection with the execution of the decree. If the decree had been adjusted in the manner alleged by the respondent, then under Section 258 such adjustment ought to have been certified to the Court. Not having been so certified, it cannot now be recognized by the Court charged with the execution

(1) MORRIS and PRINSEP, *JJ.*

1881.

BALA MAHOMED v. C. R. WEBB.

Judgment.

of the decree. It is urged on behalf of the judgment-debtor that Section 258 has reference only to money decrees and that this is apparent from its position in Chapter XIX of the Code in connection with the particular sections relating to money decrees alone. But a consideration of the terms of the section lead us to a different conclusion. That Section corresponds in all material respects and carries with it the same meaning as Section 206 of the former Procedure Code, Act VIII of 1859, which manifestly deals with the adjustment of *any* decree. Again, we cannot agree with the Judge that the case can be decided under the provisions of Section 244 whether Section 258 is applicable or not, for this would enable the Court in execution to deal with any question relating to the execution of a decree under Section 244 although the particular question then before it might be specifically provided for by another Section of the Code.

We, therefore, reverse the decision of the Lower Appellate Court and restore that of the first Court with costs.

1881.

MADHUB DAS BYRAGEE v. JOGENDRO-NATH ROY.

Judgment.

CUNNINGHAM, J.

CUNNINGHAM, *J.* :—

The first objection in this case is that the Court below ough not to have granted the application of the respondent withou better evidence of the inability of the applicant to measure th lands, and without ascertaining who are the persons liable to pa rent.

It appears that the respondent who is the proprietor of the land in question filed a verified petition in which he stated that he had endeavoured to measure the land, and had been unable to do so, and that thereupon the Court below made the order under Sec. 38 of Act VIII of 1869 B. C. now appealed against. We think that that was a rightful proceeding, and that there is no ground for setting aside the order on that account.

But with regard to the procedure adopted by the Collecto we are not satisfied that there was a "due enquiry" sufficient t comply with the requirements of Sec. 38.

That Section is a highly penal one, and we are bound t construe it with the utmost strictness. It appears that by Sec. 4 the Collector in conducting an enquiry of this kind is empowere to make use of all the powers conferred on a Civil Court by th Code of Civil Procedure in procuring the attendance of witnesse and otherwise taking evidence.

Now, it does not appear that the Collector in this case di put that section in force or make use of all the powers which th Code gives a Civil Court to procure the attendance of witnesse The consequence, is that if we upheld the present decision we shou be enforcing a very severe penalty against the witnesses whom t Collector might, if he had chosen to exercise the powers vested him by law, have brought before the Court, and thus have avoid the penalty coming into force.

Under these circumstances we think that the order appea against should be set aside, and the Collector directed to institu another enquiry using all the powers that the law gives him bring the witnesses before him. If he is still unable to ascer and record who the persons in occupation of the land are, and measure the land, he will then be at liberty to make the lap order under Sec. 38.

Costs will abide the result.

[CIVIL APPELLATE JURISDICTION.]

OY CHUNDER BISWAS (JUDGMENT-DEBTOR,)... APPELLANT;

AND

KALI KISHORE DEY SIRCAR AND OTHERS (DECREE-HOLDERS), ... RESPONDENTS.

1881. *Jan.* 12*th.*

No. 247 of 1880.

Civil Procedure Code Act X of 1877, *Secs.* 293 *and* 316—*Default of Auction-purchaser.*

Where portion of the property of a judgment-debtor has been sold in execution for a sum sufficient to satisfy the decree, the Court is not justified, on default being made by the purchaser, in directing the sale of any further portion of the debtor's property, it being open either to the judgment-creditor or the judgment-debtor to apply that the balance due upon the decree, after re-sale of the portion already sold, should be realized from the defaulter.

THIS was an appeal against the order of the Moonsiff of Bajitpore in zillah Mymensingh dated the 11th May 1880.

Baboo *Grish Chunder Chowdhry*, for the Appellant.

No one appeared for the Respondent.

The facts sufficiently appear from the following judgment of the High Court (1) which was delivered by :

PRINSEP, *J.* :—At the request of the judgment-debtor in this case, only 5 gundas' share of the property attached in execution of the decree, was sold on the 27th December 1879 for Rs. 76, a sum more than sufficient to satisfy the decree. The auction-purchaser having paid 25 per cent. as required by law failed to pay the balance. The Moonsiff thereupon instead of selling the same 5 gundas' share in which there had been this default, sold the entire 16 annas belonging to the debtor and realized Rs. 110. The Pleader for the judgment-debtor now objects to this sale on the ground that the re-sale should have been only of the same property which had been previously sold, and that if there had been any deficiency of price on the re-sale, under Sec. 293 of the Code of Civil Procedure the

(1) MORRIS and PRINSEP, *JJ.*

1881.

JOY CHUNDER BISWAS v. KALI KISHORE DEY SIRCAR.

Judgment.

PRINSEP, *J.*

purchaser who defaulted was liable, and further that if this dure had been followed, the remainder of his property woul been saved. We think that this objection is a valid objectio that the re-sale of the 16 annas of the property must be se Proceedings can only be taken for the sale of the 5 gundas property which had been sold on the 27th December 187 regarding which there had been default in payment of the purchase-money. Should the sum realized under the re-sale 5 gundas be insufficient to satisfy the decree, the law leaves either to the judgment-creditor to the judgment-debtor to that the balance should be recovered from the defaulting a purchaser.

We think it necessary to remark that the Moonsiff correct in stating that: "The fact that the purchaser 5 gundas' share omitted to pay the balance was sufficient t that the 5 gundas' share was not worth the amount." That was quite irrelevant to the case before him. The auction-pu was liable to make payment of the full sum bid, and the delay subsequent realization of the money was certainly not owing fault of the judgment-debtor.

The judgment-debtor will get his costs from the holder.

[ORIGINAL CIVIL JURISDICTION.]

KRISTO MOHINI DASSEE AND ANOTHER, ... PLAINTIFFS; 1880.

AND

KALLY PROSUNNO GHOSE AND OTHERS, ... DEFENDANTS. Dec. 7th.

Execution—Injunction restraining execution proceedings—Relief, General prayer for—Control of execution proceedings—Equity.

To prevent the sale of an estate of which A and B were joint proprietors, for arrears of Government revenue due by B, A borrowed money from C on mortgage of her share and paid off the arrears. A then sued B for contribution but pending the suit default was again made by B and the estate was sold and purchased by D "subject to all encumbrances." A eventually obtained a decree against B, the amount of the decree being declared a charge on the estate sold, which decree she assigned to E, who, after having his name placed in the record, obtained an order for execution of the decree, and attached properties of B other than the estate sold for arrears of revenue.

In pursuance of an agreement which was then made, E and C, in consideration of a putni at a low rent and without payment of salami granted to C, or to C for himself and E, by D, covenanted to release D and the estate purchased by him from all liability in respect of the decree, to entrust to him the whole conduct of the execution proceedings. The agreement contained a proviso that should the Court, in which the decree should be executed, of its own accord, or upon petition of B or his legal representatives, and notwithstanding objections on the part of E and C, make any order for execution of the decree in the first instance against the estate sold and now in the hands of D, then E and C should not be bound by their covenants, and D might cancel the agreement.

E subsequently applied for execution against the property of the infant son of B who had meanwhile died, but on an objection being taken it was directed that the decree should first be executed against the property which had been sold for arrears. On appeal, however, this order was set aside—but E abandoned these proceedings, and, having transferred the decree to the High Court

1880.

KRISTO MOHINI DASSEE v. KALLY PROSUNNO GHOSE.

Statement.

applied for execution of the decree by sale of the family dwelling house left by B.

The widow and infant son thereupon filed a suit against D, C and E, and after payment of the whole amount of the decree held by E, asked for an injunction staying all proceedings until the hearing of the suit in which they prayed, *inter alia*, that they might be allowed to stand in the shoes of E, and insist upon having the decree executed against the estate purchased by D.

Held, that inasmuch as it appeared that E had derived some advantage or benefit out of the lien directed by the decree held by him, which benefit or advantage the plaintiffs might be entitled to have valued at the hearing and the value set against the decree, although there was no specific prayer for such relief in the plaint, the proceedings should be stayed.

RULE to show cause why certain execution proceedings should not be stayed.

The circumstances under which the Rule was applied for and granted, were as follows :—Khelut Chunder Ghose and Kaminee Sundari Dassee were the joint owners of a certain estate called Alumpore registered No. 1 in the Towjee of the Nuddea Collectorate. The Government revenue through default on the part of Khelut Chunder fell into arrears, and Kaminee in order to prevent a sale of the estate borrowed a sum of money at high interest mortgaging her share of the estate to one Hurry Churn Bose, and paid off the amount of Government revenue. Subsequently on the 5th June 1872 she sued Khelut Chunder for contribution in respect of his share of the revenue so paid by her, and prayed that the debt might be made a first charge on the property for which the money had been paid. Pending this suit Khelut Chunder again made default and the estate was sold by public auction and purchased on the 23rd March 1874 by the defendant Kally Prosunno Ghose, "subject to all encumbrances" thereon. On 9th April 1874 Kally Prosunno Ghose took an assignment of the mortgage to Hurry Churn Bose. On the 11th January 1873 Kaminee's suit against Khelut Chunder was dismissed by the lower Court, but was eventually, on the 18th January 1876, finally decided in her favour in the Court of Appeal. On the 16th January 1877 Kaminee assigned the decree obtained by her against Khelut Chunder to one Rutnessur Biswas who, on the 13th July 187[illegible]

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KRISTO MOHINI DASSEE v. KALLY PROSUNNO GHOSE.

Statement.

that execution should first be taken out against the property which formerly belonged jointly to Khelut Chunder and Kaminee; and an order was passed in accordance with such objection. This order was, however, reversed by the High Court. Rutnessur, however, subsequently abandoned all previous execution proceedings, and transferred his decree to the High Court for execution against certain properties left by Khelut Chunder in Calcutta.

The widow of Khelut Chunder and the next friend of Khelut Chunder's adopted son Ramanath Ghose objected to execution being taken out against the Calcutta property and filed a suit in which, after paying the sum due to Rutnessur under the decree, into Court, they asked for an injunction to stay all further execution proceedings, and to be allowed to stand in the shoes of Rutnessur, and to realize the amount due under the decree against them, from the estate of Khelut Chunder in the hands of the defendant Kally Prosunno, notwithstanding the agreement between Kally Prosunno and Rutnessur and Hurry Churn Bose.

On the 15th September 1880 a rule *nisi* was obtained calling upon Rutnessur to show cause why all further execution proceedings should not be stayed.

Branson and *Mitter* for Rutnessur showed cause.

Kennedy, Evans, Bonnerjee and *Henderson* in support of the Rule.

Branson.—The injunction has been obtained on the facts set out in the plaint alone, no verified petition or affidavit having been filed by the plaintiffs. The Court will not make absolute the rule seeing that it has been obtained in such an irregular manner. Plaints are verified *on information and belief* and no Court would grant an injunction on an affidavit made merely *on information and belief*.

[WHITE, *J.*:—I find that the practise in the offices of the Original Side of this Court is to allow on taxation the costs of affidavits in such motions as the present, but inasmuch as such an affidavit would be but an echo of the plaint, and in my opinion a superfluity, I do not think I can refuse to hear the rule because there happens to be no petition or affidavit. The Court having granted the rule on the plaint I shall allow the rule to be heard.]

The only point raised by the other side against our right to take out execution, is that we entered into an agreement with Kally

sunno. But there has been no part satisfaction; the plaintiff kes no such allegation in his plaint, and no putni has been granted my client. [*Kennedy.*—The prayer for general relief is large ugh to include the allegation.] The question as to whether there s been partial satisfaction ought to have been raised in the execution oceedings, and not in a separate suit.—Sec. 244 of Act of 1877. here an injunction is applied for on one ground, it ought not to be anted on another which has not been put forward. Joyce on Inctions, p. 1030.

Kennedy.—We have paid the money due under the decree o Court, and it should only be allowed to be taken out on security ing given. We say that Kally Prosunno ought to pay the money d not Khelut Chunder's estate. Rutnessur and Hurry Churn reed to release the charge on Kally Prosunno and also the charge on estate in his hands. A putni pottah was executed in pursuance of agreement, and we say that Hurry Churn executed it as for nself and benami for Rutnessur or with his assent. We, therefore, k to have the equities between Khelut and Kally Prosunno deterned. Rutnessur has not been compelled to go against Allumpore, e estate formerly belonging to Khelut and Kaminee) the saving use therefore of the agreement has not been put in force.

Branson.—It is not suggested that the putni was given in part isfacton of the decree. The plaintiffs allege that the decree ltogether unsatisfied.

[WHITE, *J.*:—It appears that the decree-holders have realized e benefit under the decree.]

[The following cases were referred to: *Castelli* v. *Cook*, 7 Hare , *Waring v. Ward*, 7 Ves. 332, *Fetherstone* v. *Mitchell*, 11 L. R., q. 35.]

The following judgment was delivered by

WHITE, *J.*:—I have come to the conclusion after some doubt to ake this rule absolute.

The object of the suit is to compel Kally Prosunno Ghose to pay the extent of the value of his share in a particular zemindary the ount of a decree which has been passed against this estate.

It is unnecessary to consider the doubts as to whether the plain's will be entitled at the hearing to that relief, or any other relief some qualified form, because assuming that they could establish

1880.

KRISTO MOHINI DASSEE v. KALLY PROSUNNO GHOSE.

Judgment.

their right to any such relief I consider that the plaintiffs have failed to shew that the defendant Rutnessur Biswas who is now executing the decree ought to be stayed in consequence supposing even that such an equity exists. The Appellate Court having decided that Rutnessur may execute his decree against the estate of Khelut, and not against the estate upon which a lien was declared by the decree, he cannot in my opinion be restrained from executing his decree, because he is exercising his own right, but when he does exercise that right the plaintiffs can ask Kally Prosunno to recoup. The prayer of the plaint is not one upon which they can take this point, but I am not prepared to say that the plaintiffs may not at the hearing get the leave under the prayer for general relief against the defendant Kally Prosunno Ghose.

It is objected that having regard to the rules which govern this Court in granting injunctions, the rule should be discharged because the Court is of opinion that the injunction could only be sustained where there is specific prayer (*Castelli* v. *Cook*, 7 Hare 89). I am not prepared to give full effect to the rule asked for, but there are statements in the 18th and the following paras of the plaint which show that certain transactions have taken place between Kally Prosunno and Rutnessur, the result of which appears to me to be that Rutnessur has out of the lien directed by the decree derived some benefit or advantage, which benefit or advantage the plaintiffs ought to have valued and the value set against the amount which they are bound to pay Rutnessur under the decree. This, however, does not form the subject of a separate prayer in the plaint.

It appears to me that there is a case made out that the defendant Rutnessur's execution should be controlled. I think this Court ought to control it, and make the circumstance alluded to by Mr. Branson, a consideration in dealing with the costs.

It is also objected that as it appears that Rutnessur has been only executing the decree, the question raised by the plaintiffs as to partial discharge of the decree should be dealt with under Section 244 of the Civil Procedure Code. This is no doubt an argument to be adduced at the hearing, and I cannot at this stage of the case be called upon to decide that, nor could I dismiss the suit at this stage while this point is not decided. The money has been paid into Court by the plaintiffs, and that was one of the terms upon which this rule was obtained.

1880.

KRISTO MOHINI DASSEE v. KALLY PROSUNNO GHOSE.

Judgment.

Now the question is whether the execution-creditor is to be put to same terms if he takes out the money before the final determination of the case.

Upon the fact appearing in the plaint that Rutnessur obtained a benefit which the plaintiff ought to have in reduction of what is payable under the decree, namely, the value of an eight-annas' share in a putni lease in five villages without salamee, it may be that they are only entitled to whatever amount of money in the payment of which Khelut Chunder made default and for which his estate was sold, but all this should be decided at the hearing; at all events some benefit has been obtained which ought to go in reduction of the amount of the decree. Mr. Branson's client ought to have his costs.

The plaintiffs having paid into Court the amount of the decree and costs plus Rs. 500 for costs of execution, this rule should be made absolute, and Rutnessur be restrained from prosecuting his execution proceedings until the hearing of the suit or further order of this Court. Rutnessur to be at liberty to take the amount out of Court on furnishing security to the satisfaction of the Registrar. He will have his costs of showing cause against the rule.

[CIVIL APPELLATE JURISDICTION.]

1881.
Jan. 3rd.

No. 2294 of 1874.

TARUKPODO GHOSAL AND OTHERS, (PLAINTIFFS), ... APPELLANTS;

AND

SHYAMA CHURN NAPIT, (DEFENDANT) ..... RESPONDENT.

Landlord and Tenant—Tenancy, Right of landlord to determine.

There is no law in this country which gives anything in the nature of a protected tenure or holding to a person who has occupied homestead land, however long may have been the period of his possession.

Prosunno Coomaree Debea vs. *Sheikh Rutton Bepary*, 1 C. L. R. 577 I. L. R. 3 Cal. 696 followed.

APPEAL from a decree of the Subordinate Judge of Hooghly dated 7th July 1879 confirming the decree of the Moonsiff of Howrah dated the 15th of August 1878.

This was a suit to reject a ryot from certain homestead land after notice to quit.

It appeared that the defendant had been in possession for upwards of 20 years. The lands had originally been put into the possession of the defendant for building purposes. The defendant had built mud houses, planted trees, and dug a tank.

The plaintiffs alleged that it had been agreed that the defendant should quit whenever the lands should be required by the lessors.

The Moonsiff held that long acquiescence on the part of the plaintiffs had given the defendant the rights of a permanent holding and he dismissed the suit.

The Subordinate Judge affirmed the order of the Moonsiff. The plaintiffs thereupon preferred this appeal to the High Court.

Baboo *Golab Chunder Sircar* and Baboo *Indernath Banerjee* for the Appellants.

Baboo *Juggut Chunder Banerjee*, for the Respondent.

1881.

TARUKPODO GHOSAL v. SHYAMA CHURN NAPIT.

Judgment.

The judgment of the High Court (1) was as follows :—

We think there is nothing to distinguish this case from the case of *Prosunno Coomaree Debea* vs. *Sheikh Rutton Bepary*, 1 C. L. R., 577 (I. L. R. 3 Cal. 696.) The land which is the subject of the present suit is a piece of homestead land, and does not form part of an agricultural holding. There is no law in this country which gives anything in the nature of a protected tenure or holding to a person who has occupied such a piece of land, however long may have been the period of his possession. If there is any hardship in evicting a tenant who has held such land for a long period of time, the hardship is one for which the law prescribes no remedy, and in the present state of the law, the only advisable course to be pursued by the parties concerned is to protect themselves by contract from what may be, in the opinion of some, an arbitrary eviction.

A considerable amount of argument has been addressed to us on the third ground of appeal. It appears to us that the Subordinate Judge is wrong in holding that any agreement between the lessor and the lessee to the effect that the latter would relinquish the land whenever required to do so should in any way affect the decision of the case. An indefinite agreement of this sort has no binding force, as there is nothing to determine which of the two contracting parties is to be the judge of the conditions and circumstances under which the landlord is entitled to say that he requires the land. This appeal must be decreed and the decisions of the Lower Courts reversed with costs.

(1) McDONELL and FIELD, *JJ.*

[CIVIL APPELLATE JURISDICTION.]

IN THE MATTER OF ISHAN CHUNDER ROY,..... APPELLANT.

1881.
Jan. 28th.

No. 16 of 1880.

Probate, application for—Limitation, Act XV of 1877, *Schedule II article* 178.

No law of limitation governs applications for probate. ***Gobind Chund Gossami v. Rungun Money Dossee,*** 6 C. L. R. 345.

APPEAL against an order passed by the District Judge of Tipperah on the 31st March 1880.

Baboo *Troylukhyo Nath Mitter* and Baboo *Grish Chunder Chowdhry,* for the Appellant.

The facts of the case sufficiently appear from the judgment of the High Court (1) which was as follows:—

This is an appeal from an order of the District Judge of Tipperah rejecting, on the ground that it was barred by limitation, an application for probate of the will of one Obhoy Chunder Roy who died on the 23rd of Pous 1281, 6th January 1875. The application was made on the 11th of March 1880, that is five years and two months after the death of the testator. The Judge appears to have called for an explanation of the delay, and to have considered that no sufficient reason was made out. He rejected the application as being barred under article 178, Schedule II of the Limitation Act.

We think the Lower Court was mistaken in applying the Limitation Act to a petition for probate. If the article quoted be read alone, it does indeed seem capable of the widest extension to every possible application that can be made to the Court "for which no period of Limitation is provided elsewhere in this Schedule, or by the Code of Civil Procedure, Sec. 230."

But the preamble to the Act distinctly shows that it is not intended to apply to all, but to *certain* applications to Courts: And an examination of the 3rd division of Schedule II which deals with applications shows that every article therein contained, No. 1

(1) MORRIS & TOTTENHAM, *JJ.*

1881.

In re 'ISHAN CHUNDER ROY.

Judgment.

only excepted, specifically relates to some case pending or already decided. Article 178 must be construed with reference to the wording of the other articles, and can relate only to applications *ejusdem generis*, and therefore not to such an application as the one now before us. We find this principle has already been enunciated in this Court on the Original Side in *Gobind Chund Gossami v. Rungun Money Dossee*, 6. C. L. R., 345. It is to be observed that in the previous Limitation Acts XIV of 1859 and IX of 1871 no such article as this article No. 178 was included, and under those Acts no question of Limitation could have arisen in respect of an application for probate. It may fairly be presumed that had the Legislature intended to apply for the first time a period of Limitation to such applications, there would have been some provision in regard to them similar to that contained in Section 2 in respect of suits for which the new Act prescribes a shorter period of Limitation than was previously allowed.

Altogether we are of opinion that no Law of Limitation governs applications for probate. Of course long unexplained delay may in certain cases throw doubt on the genuineness of the will propounded; but that is a different thing from saying that probate is barred by limitation.

The appellant is entitled to have his application decided on its merits.

The Lower Court's order is therefore set aside; and the case will be returned to it to be dealt with according to Law.

[CIVIL APPELLATE JURISDICTION.]

1880. June 28th. JOYRAM LOOT (PLAINTIFF), ... APPELLANT,

AND

No. 2277 of 1877. PANI RAM DHOBA AND ANOTHER (DEFENDANTS), RESPONDENTS.

Limitation—Act IX of 1871, *Sec.* 1. *cl.* (*a*)—*Act XV of* 1877—*Repealing words, Act VIII of* 1859, *Sec.* 246.

Clause (*a*), Sec. 1 of Act IX of 1871 has reference only to suits actually instituted before that date.

THIS was an appeal against the decree of the Deputy Commissioner and Subordinate Judge of Nowgong, dated the 21st July 1879 affirming the decree of the Sudder Munsiff of Nowgong, dated 31st January 1879.

Baboo *Sreenath Banerjee*, for the Appellant.

Baboo *Hurry Churn Chuckerbutty*, for the Respondent.

The facts, so far as they are necessary for the purposes of this report, sufficiently appear from the judgment of the High Court (1) which was as follows:—

We think that the Lower Court is wrong in the view it has taken that the suit is barred by virtue of the operation of the law of limitation, inasmuch as it was not instituted within one year from the order passed under Section 246 of Act VIII of 1859. That order is dated the 5th May 1871.

On that date Section 246 of Act VIII of 1859 as originally enacted was in force, and under its terms the present plaintiff whose objection was disallowed was bound "to bring a suit to establish his right at any time within one year from the date of the order." The last twelve words of Section 246 of Act VIII of 1859, were, however repealed by Act IX of 1871, and as has been held in several cases, (see *Koylash Chunder Paul Chowdhry* vs. *Preonath Roy Chowdhry*, I. L. R. 4 Cal. 610, (S. C.) 3 C. L. R., 25) the

(1) MORRIS & PRINSEP, *JJ.*

effect of their repeal was to give a person in the position of the plaintiff, the benefit of the ordinary rule of limitation. That is, he might take as his cause of action any act by which the full exercise of his right of ownership has been disturbed and obtain a decree, the effect of which would be to avoid the operation of an adverse order under Section 246 without being compelled to bring a suit to set aside such summary order within one year from the date on which it was passed.

For the plaintiff it is contended that that repeal came in force on the 1st July 1871 and in our opinion this interpretation of section 2 of Act IX of 1871, is correct. The pleader for the defendant respondent on the other hand contends that for the purposes of a suit of this kind, Act IX of 1871 did not come into force till the 1st April 1873. He points to Clause (*a*) of section 1 by which the repeal does not affect suits instituted before that date and argues that the plaintiff cannot claim the benefit of that Act and that his suit has been rightly held to be barred. It seems to us, however, that Clause (*a*) of section 1 has reference only to suits actually instituted before the 1st April 1873. This provision evidently was made in the interests of suitors the option being given them either of availing themselves of the old law up to April 1st 1873 or of waiting and taking the benefit of any change introduced into the new law in their favor.

The plaintiff did as a matter of fact bring a suit in proper time, but as he was found to be in possession, the Subordinate Judge on appeal dismissed it on the ground that he had no cause of action. It is unnecessary, however, further to advert to this.

By the alteration of the law caused by the enactment of Act IX of 1871, plaintiff was therefore entitled to bring a suit to recover possession of any land within twelve years from the date of dispossession notwithstanding the order passed under section 246, Act VIII of 1859.

But on the 1st October 1877, that is, much before that period had expired, the law was again altered by the passing of Act XV of 1877—and article 11 Schedule II of that Act requires that such a suit shall be brought within one year from the date of the order disallowing a claim to possession. The last clause of Section 2 of the Act, however, provides for cases where Act XV of 1877 shortens the

1880.

JOYRAM LOOT v. PAM RAM DHOBA.

Judgment.

period of limitation prescribed by Act IX of 1871 by allowing all suits of that nature to be brought within two years next after the 1st October 1877. The present suit of the plaintiff therefore falls within this class, but as it was brought on the 17th June 1878 it must be held to be within time.

The orders of the Lower Courts disallowing the claim of the plaintiff on the ground of limitation are set aside, and the case is remanded to the first Court to be tried on the merits.

Costs to abide the result.

Court fees paid for appeals in this Court, and in the Lower Appellate Court must be refunded to the appellant.

[CRIMINAL JURISDICTION.]

1881. *Jan. 27th.*

No. 9 of 1881.

IN THE MATTER OF JANOKINATH GUPTA, ... PETITIONER.

Act V of 1861 *Section* 29.

A constable cannot be convicted under Section 29 of Act V of 1861 for having failed to join his appointment on the expiration of his leave.

MOTION to set aside a conviction and sentence passed by the Magistrate of Howrah.

The circumstances of the case appear from the judgment of the High Court (1) which was as follows :—

The petitioner, a constable obtained a month's leave, but failed to join his post on the expiration of that time. For this omission on his part he has been committed under Section 29 of Act V of 1861, and sentenced to two months' rigorous imprisonment.

We think the conviction is bad because his failure to resume his duty on the expiration of the leave does not in our opinion constitute an offence under the aforesaid section.

The conviction is therefore set aside.

(1) MITTER and MACLEAN, *JJ.*

[CIVIL APPELLATE JURISDICTION.]

DINONATH MUKERJI AND OTHERS (PLAINTIFFS,) APPELLANTS;

AND

GOPAL CHURN MUKERJI AND OTHERS (DEFENDANTS,) ..... RESPONDENTS.

1881. *Jan. 28th.*

Nos. 116, 129, 203 & 204 of 1879.

Hindu Law—Inheritance—Adopted son, rights of inheritance of—Collateral heirs, Rights of adopted son inheriting with—Document, Construction of.

An adopted son inheriting collaterally along with collateral heirs is entitled to receive the same share as the other heirs.

The Dattaka Chandrika, Sec. V, paras. 24 and 25 cannot be construed as an express text limiting the share of an adopted son inheriting collaterally to half the share taken by the other collateral heirs.

In construing a document the situation of the parties and their rights at the time of the execution must be looked at.

APPEALS from a decree of the Subordinate Judge of Nuddea dated the 31st December 1878 and 10th February 1879.

In this case one Haradhon Mukerji, the adopted son of Ghonesham Mukerji died leaving his widow, Sukhimoni, and Brojogopi an unmarried daughter. Brojogopi afterwards married Jibun Kristo Chatterji but died without issue in the lifetime of her mother. Sukhimoni died on the 6th Pous 1281 having up to the time of her death been in possession of her deceased husband's estate. Dinonath Mukerji, junior, one of the plaintiffs, Brojoraj the father of the remaining plaintiffs, and the defendants Dinonath Mukerji, senior, Gopal Churn and Boidynath Das were the five heirs of Haradhon at the time of Sukhimoni's death. The relationship of the parties appears from the following genealogical table:

GOGENDRO NARAIN MUKERJI.

- Ghonesham.
  - Haradhon. × Sukhimoni.
    - Brojogopi.
- Gobind.
  - Brindabun.
    - Hurri Mohun.
    - Khetter Paul.
  - Prankisto.
    - Gopal Churn (deft.)
- Goluck.
  - Mothur.
    - Annodamoni.
  - Nobokristo.
  - Ram Chunder.
    - Brojoraj.
      - Aghore and his brothers (plffs.)
    - Dinonath (plff.)
    - Jodunath.
- Anup Narain.
- Rushanund.
  - Nobin.
    - Boidynath (adopted) deft.
  - Srikristo.
    - Dinonath deft.
- Biressur (by another wife).
  - Gopalkristo.
    - Aukhoy.

1881.

DINONATH MUKERJI v. GOPAL CHURN MUKERJI.

Judgment.

The three defendants after the death of the widow applied for and obtained a certificate under Act XXVII of 1860 to the exclusion of the plaintiff Dinonath and the sons of Brojoraj who now seek to recover possession of their shares in the inheritance which, according to their calculation, was 7 annas 2 gundas of the whole.

The Subordinate Judge held that the plaintiffs were entitled to a 6 annas 8 gundas share.

The facts will be found stated at length in the judgment of the High Court to which the defendants appealed.

Evans, Baboo *Rash Behary Ghose*, Baboo *Gooroo Dass Banerjee* and *Bipprodass Mookerjee*, for the Appellants.

Baboo *Sreenath Dass*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Hem Chunder Banerjee* and Baboo *Doorga Dass Dutt*, for the Respondents, in appeal No. 129.

Baboo *Sreenath Dass*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Hem Chunder Banerjee* and Baboo *Doorga Dass Dutt*, for the Appellants.

Baboo *Rash Behary Ghose*, Baboo *Gooroo Dass Banerjee*, and Baboo *Bipprodass Mookerjee*, for the Respondents, in appeals Nos. 203 and 204

The judgment of the High Court (1) was as follows:

No. 129. The position of the parties to this case will appear from the genealogical tree to be found at the end of the judgment of the Subordinate Judge at page 204 of the paper-book. The suit is concerned with the property of one Haradhon, deceased, and the plaintiffs and the defendants in the present case are admittedly the reversionary heirs entitled upon the death of Sukhimoni, the widow of Haradhon. It appears that the defendants Gopal Charan, Dinonath and Boidonath, upon the death of the widow Sukhimoni, obtained a certificate under Act XXVII of 1860, and that under color of this certificate they set up a claim to the whole of the property left by Haradhon, to the exclusion of the plaintiffs. In consequence of this, the plaintiffs, Dinonath the son of Ram Chunder, and Aghore Nath and others, the children of Brojoraj, another son of the said Ram Chunder have brought this suit to recover their share of the property, moveable and immoveable, left by Haradhon and this share they alleged to be 7 annas 2 gundas.

(1) McDONELL and FIELD, *JJ.*

1881.

DINONATH MUKERJI v. GOPAL CHURN MUKERJI.

Judgment.

The first question which it will be convenient to decide is t exact share to which the plaintiffs are entitled. It will be obser that the shares into which the property of Haradhon is to divided are five in number, and of these the children of Brojo take one share, Dinonath the plaintiff gets one share and the th defendants are entitled to a share each. The contention on t part of the plaintiffs is that inasmuch as Boidynath was an adop son of Nobin, he is not entitled to receive a full share, that an equal share with the other four reversionary heirs; while the other hand it is contended that each of these five heirs is en tled to an equal share.

The Subordinate Judge has held that each of the five he must share equally and that the plaintiffs are therefore entitled 2/5ths or 6 annas 8 gundas of the inheritance.

It is urged in the fourth ground of appeal that the plainti are entitled to receive in all 7 annas 2 gundas; and this calculati is based on the contention that the adopted son Boidynath can ha only a share equal to half of the share received by each of the ot four heirs. In support of this contention the case of *Raghuban Doss* v. *Sadhu Churn Doss*, I. L. R. 4 Cal. 425 is relied upon; b we think that that decision does not govern the present case. T question there was whether the adopted son of a natural son w entitled to receive a full share and MARKBY, *J.* after consider the amended translation of Mr. Sutherland's Dattaka Chandr expresses his conclusions in the following words:—"But e "if we strike out these words and take the two paragra "according to their more correct version, they clearly enun "that, upon partition, an adopted son and the adopted "of a natural son stand exactly in the same position and "each takes only the share proper for an adopted son, *i. e.*, hal "the share which he would have taken had he been a natural The present case is not that of an adopted son or the adopte of a natural son becoming heir along with another son or sons to the adoptive father or grandfather; and we think that matter is concluded by the decision in the case of *Tara M Bhuttacharjee* vs. *Kripa Moyee Debia*, 9 W. R., 424. The ed Judges who decided that case say: "There is no contention "if after a son be adopted, a son be born of the body, the lat

"entitled to the larger portion of the inheritance whether two-thirds or three-fourths, and the former only to the remainder. "There can also, we believe, be no doubt that an adopted son is "entitled to all the rights and privileges of a son of the body "legitimately begotten, where there is no such son subsequently "born. The decisions of the late Sudder Court quoted in the "margin, and the following passage from "the Vyavastha Darpana, page 887 of the "2nd Edition, verse 584, supported by "authorities, prove that such is the case. "'An absolute Dattaka properly adopted "ceasing to belong to the Gotra of his "natural father, becomes a member of the family of his adopter, "and represents his legitimately begotten son, and the duties "and the rights of the legitimately begotten (Ourasa) son devolve "upon him.' A case is quoted to us from II Macnaghten, page "69 *ff.* Looking at the answer given, we have some doubt whe-"ther there was not some confusion in the Pundit's mind as to the "position of the adopted son in that case, but whether this be so or "not, that case is not applicable to the present.

7 Select Reports, page 206.

6 Select Reports, page 203.

Sudder Decisions for 1858, page 1863.

"It appears to us that the position of an adopted son is affected "only by the birth of a subsequent legitimately begotten son of "the adopting father, *that when an adopted son comes to share "with heirs other than the legitimately begotten sons of his adoptive "father in the property of kinsmen, he takes the same share that "they would have.* He represents his adoptive father, and is en-"titled to the share which his father would have obtained. In the "present case, plaintiff and defendant are in equal relationship to "Romanath Chuckerbutty; their respective grandfathers were "his first cousins, and their respective fathers were his first cousins "once removed, so that, if the property had been inherited either "by their grandfathers or by their fathers, the shares of each would "have been equal; and, such being the case, there is no reason "why the plaintiff and defendant should not each take the share to "which their respective fathers were entitled.

"A passage from the Dattaka Chandrika, Section V, para 25, "has been quoted to us to prove that the adopted son of a brother "does not receive the same share as his uncle; but all that the

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Judgment.

" passage appears to rule is, that the adopted son of one adopt
" succeeds only to his adoptive father's estate. In the present ca
" we find that the adoptive father would have been entitled to
" moiety of the property left by Romanath Chuckerbutty, and his i
" son we think entitled to that share. The rule requiring an adop
" ted son to take a smaller share than a son of the body does no
" in our opinion, hold good in this case, for the claimants do no
" derive their title from the same father."

The position that an adopted son has in every respect, the sam rights as a natural son unless curtailed by express texts has no been settled definitively by the case of *Joy Kishore Chowdhry* v *Panchoo Baboo*, 4 C. L. R. 538 (S. C.) (nomine) *Puddo Kumar Debee* vs. *Juggut Kishore Acharjee*, I. L. R. 5 Cal. 615 : and i the case of *Uma Sarmai Martra* vs. *Kali Kumal Mozumdar*, C. L. R., 145 this principle has been carried to its full extent in th case of an adopted son claiming to inherit from his adoptive mother.

It has been contended that, admitting the principle establishe by the Full Bench decision in Indian Law Reports, 5 Cal. 61 yet in the present case, according to the true construction of th Dattaka Chandrika Section V, paras 24 and 25, an adopted so inheriting collaterally along with other collateral heirs is entitled t receive only half of the shares received by them. The passage upo which this contention is based was relied upon in the case quot from the 9th Weekly Reporter and was there duly considered.

We have carefully considered the arguments addressed to and in our opinion paras 24 and 25 of Section V of the Datt Chandrika cannot be construed as an express text limiting the sh of an adopted son, so inheriting collaterally, to half the share ta by the other collateral heirs. We think that the true meaning those paragraphs is that an adopted son and the adopted son o natural son stand in the same position, and that there was no in tion to extend this rule to distant collateral heirs.

With reference to the cases to be found at pages 69 and 8 2 Macnaghten's Principles of Hindu Law, we observe that o those at least was also quoted before the Judges who decided case in 9 W. R., and we are of opinion that those precedents be taken to have been overruled by the decision just referre We think, therefore, that the Subordinate Judge has rightly de

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Judgment.

that the share which the plaintiffs are entitled to is 2-5ths or 6 annas 8 gundas.

The next point which it will be proper to consider is the effect of the Ekrar, dated 10th Bhadro 1270 to be found at page 114 of the paper-book.

It has been contended by the defendants, and the Subordinate Judge has found in favor of this contention, that the effect of this Ekrar was to debar Dinonath and Brojoraj who executed it from questioning any alienations of the property of the propositus Haradhun made by the widow Sukhimoni. It appears that after the death of Haradhun, his widow Sukhimoni was engaged in litigation with the other members of the family. As the result of the case which went up to the Privy Council, Sukhimoni succeeded in establishing her own and her husband's right to a share of the family property. Dinonath, Brojoraj and Nobokisto (see genealogical tree) were the persons who resisted her with the greatest pertinacity; and the effect of the Ekrar appears to have been a settlement of all the matters in dispute between the two persons just first mentioned and the widow, these persons having evidently come to the conclusion that they could no longer successfully carry on the contest. Brojoraj has died since the execution of that Ekrar and he is represented in the present suit by his children. Whether supposing that Brojoraj intended to give up his reversionary rights by the Ekrar, such a contract could be subsequently binding upon his children is a point which has not been argued before us; and, according to the view which we take of the case, it is unnecessary to determine it. In order to put a correct construction upon the terms of the Ekrar, it will be important to examine the state of things between the parties at the time of its execution as shown by the contents of the ekrar itself and by other external facts which either have been proved, or have been admitted in the course of the arguments on either side. That this is a proper mode of construing the ekrar we entertain no doubt. In the case of *Srimati Rabutty Dossee* vs. *Shib Chunder Mullick*, 6 Moore's I. A., 17, their Lordships of the Privy Council said with reference to a similar instrument:—"The situation of the parties must be looked at, and the deed must be construed with reference to the situation of the parties and their rights at the time the deed was executed." Extrinsic

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evidence is admissible to show the situation of the parties to show the circumstances surrounding the authors of the instrument (Taylor on Evidence, ss. 1082—1086 and cases quoted) for the purpose of ascertaining their intentions, but those intentions must ultimately be determined by the language of the instrument as explained by such extrinsic evidence (*ib.* s. 1087). Let us now apply these rules of construction. The widow Sukhimoni having succeeded in the Privy Council case was entitled to recover possession of the share of the property to which her husband had been held entitled. When she attempted to take possession of Dihi Balohar in Pergunnah Sahanjian in the District of Jessore, she was met by certain leases set up by Dinonath, Brojoraj and Nobokisto. These persons admitted that under the Privy Council decree she was entitled to the proprietory interest in Balohar, but they denied that she was entitled to obtain khas possession in consequence of the leases just mentioned which purported to create in them an interest intermediate between the proprietor and the cultivators. She had, in consequence to bring a fresh suit for the purpose of having these leases set aside and recovering khas possession of the land. In this suit she succeeded, and she obtained a decree for possession together with mesne profits. Litigation was also going on in the District of Nuddea; and in all this litigation it would appear that Dinonath, Brojoraj and Nobokisto were defeated. Under these circumstances Dinonath and Brojoraj saw the advisability of coming to terms, and the ekrar which we have to construe was executed between them and the widow Sukhimoni. The portion of the ekrar with which we are immediately concerned is the second paragraph, item II, and that paragraph runs as follows;—"You obtained (against us) a decree in the "Civil Court of Jessore for an 8 annas share of 54 Mouzahs of "Dihi Bonohur in Pergunnah Sahanjian recorded in No. 60 on the "rent roll of the Nuddea Collectorate. We have filed appeal No. "606 of 1862 in the Honorable High Court against that order and "the appeal is now pending trial. We have, however, very little "hope of being victorious in that case. We have already become "liable for a large amount of wasilat and costs and may probably "be liable for a larger amount. Being requested to remit the "amount due to you on account of the said wasilat and costs, you "release us from our liability to pay the costs and wasilat in res-

" of the 10 annas 6 gundas 1 cowrie 1 crant share representing our " interest in the case; and we, in consideration thereof, deliver to " you, in accordance with the order of the Court, khas possession of " a 5 annas 6 gundahs 2 cowries 2 crants share out of the 10 annas " 13 gundas 1 cowrie 1 crant share constituting our right in the " said Talook, and we relinquish our two shares of the claim in the " appeal case. We shall, within one month hence, file in the said " appeal case petitions of withdrawal in respect of our two-thirds " share. If we fail to file the petition of withdrawal and if there- " upon any such order be passed as may be prejudicial to your in- " terests, then that order shall be ineffectual. You shall, under the " terms of this ekrar enter upon possession of the said 5 annas 6 " gundahs 2 cowries 2 crants share together with other properties ob- " tained under decree, and shall enjoy the same with a right to " transfer the same by sale or gift. We or our heirs shall never " object to the same; and, even if we or they do raise any objection " shall not be valid. You or your representatives shall not (on the " otherhand) at any time claim the aforesaid costs and wasilat from our " heirs or from our mourosidars." I here transcribe in the original the paragraph upon which the defendants rely;—আপনি এই একরারের সর্ত্তমত ডিক্রি প্রাপ্ত অন্যান্য বিষয়ের সহিত উক্ত বলুহারের ।/৬॥/ ক্রান্ত অংশের দখলকার হইয়া দান বিক্রয়ের স্বত্বাধিকার পূর্ব্বক ভোগবান করিবেন।" (aponi ei ekrarer satyamote dekriprapto ananyo bishoyer sahit ukto bolohar 5 anna anser dakhilkar hoiya dan bikroyer satyadhikar purbok bhogoban kariban.) According to the first contention of the defendants, this amounted to an agreement on behalf of Dinonath and Brojoraj that the widow would have an absolute right of disposal, by gift or sale, not only over the 5 annas share which was the subject of the instrument, but also over the whole of the property which came to the widow under the decree of the Privy Council; and that in respect of both these items they intended to abandon any right on their part to object, as reversioners to any alienations at any time made by the widow.

We think that according to the strict grammatical construction of the sentence, it is impossible to say that the words "দখলকার হইয়া দান বিক্রয়ের স্বত্বাধিকার পূর্ব্বক ভোগবান করিবেন" (dokholkar hoiya dan bikroyer satyadhikre purbok bhogoban thakiben) were intended to govern anything more than the 5 annas share; in other

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words, we cannot accede to the contention of the defendants that these words were intended to govern and have effect upon, not only the 5 annas share but the other properties referred to in the passage just quoted. A long argument has been addressed to us as to the meaning and interpretation of this passage and it has been contended that the reference to the "ডিক্রীপ্রাপ্ত অন্যান্য বিষয়" (dikriprpto ananye bishoy) or other property acquired by the decree can have no meaning unless it was intended by the parties that the words "দিখলকার হইয়া দান বিক্রয়ের স্বত্বাধিকার পূর্ব্বক ভোগবান থাকিবেন" (dakilkar hoiye dan bikroyer satyadhikar purbhok bhogoban thakiben) should apply to this other property as well as to the 5 annas share which formed the subject of compromise. We think, however, that the introduction of these words is easily explained with reference to the admitted facts of the case. The plaintiff had obtained khas possession of the other lands included in the Privy Council decree and had been kept out of khas possession of the Bolahar lands by reason of the leases already referred to. The result of the compromise was that the widow forgave the claim for wasilat and obtained khas possession of a 5 annas odd share and as to another 5 annas share the leases were allowed to stand. This being so, the obvious meaning was that the widow was to obtain possession of the first five annas share along with the other property obtained by the decree, or in, other words, as she had already obtained khas possession of the other property, she was also to obtain khas possession of this 5 annas share which Dinonath and Brojoraj gave by the ekrar. We think then that the grammatical construction of the sentence and the contemporaneously existing acts lead with necessity to the conclusion that the words "take possession and enjoy with the right to make a gift of, or sell" were intended to govern and operate upon the five annas share only.

This being so, we come to the next contention of the defendants namely, that these words amount, at least so far as concerns the 5 annas share, to an abandonment by Dinonath and Brojoraj of their reversionary rights, and to a grant of a complete and absolute power of alienation to the widow. It is admitted on all hands that Dinonath and Brojoraj were not reversionary heirs at the time when the ekrar was executed, and that they might never have become reversionary

heirs. Under these circumstances, we think it impossible to suppose that Dinonath and Brojoraj intended, when executing the ekrar, to give up any reversionary rights which admittedly did not at that time belong to them and which possibly might never have accrued. If the parties had any such intention as this we might expect to find a recital of the position in which Dinonath and Brojoraj stood as possible reversioners followed by an express agreement to withhold the exercise of those rights if they ever accrued to these persons and it appears to us, from our experience of documents of this kind in this country, extremely improbable that a substantial and important stipulation of this kind would have been introduced indirectly in the course of a paragraph concerned with other matters instead of forming the subject of a separate and distinct clause or paragraph of the instrument. We have said that at the time of the execution of the ekrar, Dinonath and Brojoraj were not the next reversioners and, under those circumstances, it is extremely unlikely that the contracting parties had any intention to deal with a state of things and the exercise of rights which did not then exist. Then again the widow's daughter was at that time alive and had been recently married and there was no reason to suppose that issue would not have been the result of this marriage. Having regard then to the situation of the parties and the surrounding circumstances, we do not find any motive which might be supposed to have influenced the widow in insisting upon obtaining a higher right than that ordinarily enjoyed by a Hindu widow. Looking at the language used, the words "দান বিক্রয়" (gift and sale) are not enlarged, implying that a *complete* or *absolute* power of gift or sale was conferred by any adjective and it seems just as natural to suppose, having regard to the fact that one of the contracting parties was a Hindu widow, that the right of gift and sale intended to have been given to her was nothing more than such right of gift and sale as ordinarily belongs to a Hindu widow. There is, in other words no reason why we should presume that an absolute right of gift and sale was intended when no express language indicating such an intention has been used. In support of his argument on this point the learned Counsel, Mr. Evans has relied upon the case of *The Directors of the London and South-Western Railway Company* vs. *Blackmore*, L. R. 4 E. and I. Appeals, 623 Lord Westbury there

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said:—" There was a ... point ... raised in the argume learned Counsel ... that the present plaintiff has lost his rig operation of a general release which he gave to the Compa occasion of some dispute between himself and the Compa terminated in an agreement with respect to the wall and tenance thereof. Now it is impossible to accede to that a The general words in a release are limited always to that those things which were specially in the contemplation of t at the time when the release was given. But a dispute not emerged, or a question which had not at all arisen, considered as bound and concluded by the anticipatory w general release." Although the *ekrar* in this case was form of a general release, the above *dictum* has a certain as a canon of construction to the case of a general release

The Subordinate Judge expresses an opinion that as Sukhimoni paid a heavy price for what she obtained ekrar, it is natural to suppose that she stipulated for and higher rights than those ordinarily appertaining to a Hin under Hindu law. If we examine the ekrar as a whol find that the price paid by the widow was not so very he afford much support to this argument. The first paragra ekrar shows that Dinonath and Brojoraj were indebted to in a total sum of Rupees 10,898 consisting of three item vision is made for the payment of the whole of this sum second paragraph the widow no doubt gives up a conside of wasilat due upon the two-third share of Bolohar, but borne in mind that Dinonath and Brojoraj were in khas of this mouzah; and, according to the practice and de in this country, could give a great deal of trouble to t before she could ultimately succeed in obtaining peaceful of the property. It is quite reasonable to suppose that s enter upon a further continuation of the litigation, she abandon a claim for wasilat (the chances of realizing whi tion to the 10,898 Rupees abovementioned from an im opponent were probably very small) and to receive instead stantial advantage of getting immediate and peaceful po a five anna share of the property, allowing Dinonath and to maintain the leases for the other five anna share. A

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thing more than the restricted right of gift and sale which belongs to a widow's estate as such.

[The Court then considered the effect of certain leases and tenures created in respect of certain of the properties in dispute in this suit, and then proceeded to the determination of the other appeals which were in most respects similar to Appeal No. 129.]

[CRIMINAL REVISIONAL JURISDICTION.]

1881.

Feb. 28th.

No. 50 of 1881.

IN THE MATTER OF DEELA MAHTON.

Criminal Procedure Code, Act X of 1877, *Section* 359—*Refusal to summon witnesses—Evidence.*

In a provention the case on both sides having been closed, the Magistrate issued a summon to a witness to give evidence, whereupon, the accused filed a petition praying to have certain witnesses summoned to give evidence to rebut that of the witness called by the Magistrate. The petition was refused.

Held, that the Magistrate was not at liberty to refuse to summon the witness tendered by the accused, except on the grounds specified in Section 359 of the Code of Criminal Procedure—and that the fact that the accused had, at the close of his case, stated that he did not wish to call the witnesses whom he now tendered was no reason for refusing to summon them to meet fresh evidence taken by the Magistrate.

MOTION to set aside a conviction and sentence passed by the Deputy Magistrate of Barh, on the 22nd of November 1880, under Section 323 of the Indian Penal Code.

The grounds upon which revision of the sentence in question was sought were the following :

After the witnesses of both parties in the case had been examined, the argument concluded and the case closed on the 12th November, the Deputy Magistrate summoned the Head Constable to give evidence on the 22nd November.

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On the 13th November the day after the summons issued he accused put in a petition objecting to the Head Constable being called as a witness for the prosecution at that stage of the case, and praying that certain witnesses whom he (the accused) had summoned, and who had appeared on the 17th November but whom he had not examined, owing to the apparent weakness of the case for the prosecution, might be re-summoned and examined, so that he might have an opportunity of meeting the statements made by the Head Constable.

The Deputy Magistrate rejected this petition, and the accused alleged that by such rejection he had been materially injured.

Mr. *R. E. Twidale,* for the Petitioner.

The judgment of the High Court (1) was as follows :—

We think that the Magistrate was not at liberty to refuse to summon the witnesses tendered by the accused except on the grounds specified in Section 359 of the Code of Criminal Procedure; and that if he did refuse on those grounds, he ought to have proceeded under that Section. The fact that the accused stated that he did not wish to examine those witnesses when the case closed, was no reason for refusing to summon them to meet fresh evidence which had been taken by the Magistrate after hearing the arguments on behalf of the defence. We must accordingly direct that the proceedings be recommenced from that stage, and that the Magistrate do either take the evidence, or record his reasons for not doing so, and proceed as directed by law.

(1) CUNNINGHAM and PRINSEP, *JJ.*

[CRIMINAL REFERENCE.]

1881.
Feb. 25*th.*

IN THE MATTER OF NAKI HAZI.

No. 8 of 1881.

Recognizance—Criminal Procedure Code, Act X of 1872, *Section* 489—*Penalty under Recognizance bond, Remission of.*

Where the penalty under a recognizance bond has been forfeited, neither the Magistrate nor the High Court has power to reduce the amount of the penalty.

REFERENCE under Section 206 of Act X of 1872 submitted for the opinion of the High Court by the Sessions Judge of Sylhet under the following circumstances :

The applicant Naki Hazi was on 2nd September last, in an assault case bound over in a recognizance for Rs. 100 to keep the peace for six months, under Section 489 Code of Criminal Procedure and on the next day he threatened to assault and kick a peon of the Court of the Assistant Commissioner while he was turning him and others out of the verandah under orders of the Court. For this he was convicted and sentenced to a week's rigorous imprisonment under Section 353 Indian Penal Code, and was called upon to show cause why the recognizance should not be forfeited. He failed to show cause, and the Assistant Commissioner ordered the bond to be forfeited under Section 502 of the Code of Criminal Procedure. The amount has since been realized and credited to the Treasury.

The applicant applied to the Sessions Court for revision, and it appeared to that Court that the forfeiture of the entire amount, viz. Rs. 100 was too severe, and that the penalty ought to be reduced from Rupees 100 to Rs. 5, as the matter was one in which a person being suddenly pushed might make use of a threat which he would never actually carry out.

The following opinion upon the referee was given by the High Court (1) :—

Neither the Magistrate nor the High Court has power to reduce the amount of the penalty entered in a recognizance bond. *Nilmadhub Ghosal,* 19 W. R. cr., 1; *Empress* v. *Nurul H*... I. L. R. 3 Cal., 757. The Sessions Judge, if he thinke proper, should refer the matter to Government.

(1) CUNNINGHAM and PRINSEP, *JJ.*

[CIVIL APPELLATE JURISDICTION.]

RUPENNESSA BIBI CHOWDHRANI & ORS. (PFFS.) APPELTS.; AND ABEDUDDIN MAHOMED AND OTHERS, (DEFNTS.) RESPONDENTS.

1881. *Feb.* 17*th*.

Nos. 1189 to 1211 of 1879.

Act VIII (B. C.) of 1869, ***suit for rent at rate fixed by Collector—Act VI (B. C.) of*** 1862, ***Proceedings of Collector under—Void proceedings under Act VI (B. C.) of*** 1869, ***Sec.*** 10, ***whether binding on Civil Court.***

In a suit for arrears of rent under Act VIII (B. C.) of 1869 claimed at a rate fixed by the Collector under section 10 Act VI (B. C.) of 1862, it appeared that the proceedings had before the Collector were *ultra vires*, irregular and beyond his jurisdiction.

Held, that although there had been no appeal preferred against the decision of the Collector, the Civil Court was not bound to recognize his proceedings.

APPEALS from a decree passed by the Subordinate Judge of Rungpore, dated the 19th March 1879 reversing the decree of the Moonsiff of Bhotmari, dated 26th of August 1878.

The plaintiff in this case brought a number of suits under Act VIII (B. C.) of 1869 to recover arrears of rent in respect of a fractional share held by him in a certain mouzah from the defendants. All the suits were tried together. The arrears of rent sued for were for the years 1281, 1282, 1283 and part of 1284 at the rate fixed by the Collector in a proceeding had at the instance of the plaintiff alone under section 10 of Act VI (B. C.) of 1862.

The defence raised was that the rates claimed were exorbitant, that the defendants were not bound by the proceedings had before the Collector in as much as they had not been parties thereto and the proceedings had, for reasons alleged by them, been illegal and irregular.

In support of the contention that the proceedings were illegal as being *ultra vires*, the following decisions were quoted in the Court of First Instance: *Anunt Manjhee* vs. *Joy Chunder Chowdhry*, 12 W. R., 371; *Mahomed Bahadur Mojoomdar* vs. *Rajah Raj Kishen Singh*, 15 W. R., 522; *Sree Misser* vs. *Crowdy*, *ib.*, 243; *Shaikh Jamal-ooddeen Hossein* vs. *Ramadhin Misser*, 24 W. R., 331.

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The Moonsiff however was of opinion that the proceedings of the Collector however irregular and illegal could not be impeached in as much as they had not been objected to or appealed against at the time and had now become final and conclusive.

He accordingly gave the plaintiff a decree in all the suits.

On appeal the Subordinate Judge held that the proceedings of the Collector had been *ultra vires* and irregular, and were therefore not binding, and he reversed the decision of the Moonsiff.

Second appeals were thereupon preferred to the High Court.

Branson, Mr. *C. Gregory* and Baboo *Grija Sunkur Mozoomdar*, for the Appellant.

Baboo *Sreenath Dass* and Baboo *Golap Chunder Sircar*, for the Respondents.

The judgment of the High Court (1) was as follows :—

In all the suits for arrears of rent, out of which these appeals arise, the Subordinate Judge has declined to recognize the rates of rent fixed by the Collector in the proceedings held by him at the instance of the plaintiff under section 10 of Act VI (B.C.) of 1862, and has dismissed the plaintiff's suits, save in respect of certain sums admitted by the defendants themselves. The judgment of the Subordinate Judge is appealed against, on the ground that he cannot go behind the decision of the Collector under Act VI (B.C.) of 1862, that the defendants made no appeal at the time against the decision under section 10, and that, therefore, the proceedings under that section are final.

It seems to us, however, clear on the face of these proceedings that the Collector acted without jurisdiction and that, therefore the Subordinate Judge is right in declining to accept the rates that have been fixed by him. *First*, the Collector proceeded on the application of a fractional holder of the estate only, and not on the application, as the law requires, of the "proprietor" of the In his plaint in the several suits before us, the plaintiff himself admits that it was he alone who instituted proceedings in the Collector's and that out of the entire 16 annas, he held a 2 annas 8 gunda share only. But in numerous decisions of this Court, it has been held that an applicant under section 10 Act VI of 1862, (B.C.) must be the proprietor of the estate, not a shareholder only in the

(1) MORRIS and TOTTENHAM, *JJ.*

[CIVIL APPELLATE JURISDICTION.]

1881. *Feb. 28th.* SARKIES, ... PLAINTIFF;

AND

PROSONOMOYEE DOSSEE AND OTHERS, ... DEFENDANTS.

Dower—Introduction of English Law—Freehold Estates of Inheritance—Armenian Widow—English Law, how far applicable in Calcutta—Succession Act (X of 1865), Section 4—Estoppel—Admissions by Conduct—21 Geo. III, C. 70, Section 17—Dower Act (XXIX of 1839).

The widow of an Armenian, married before the Dower Act (XXIX of 1839), is entitled to dower out of lands which her husband held during the marriage for an estate of inheritance, as against a Hindu purchaser for value from the husband during his life, the English law of dower having been recognized in this country amongst Europeans and Armenians as a branch of the law of inheritance.

Per GARTH, *C. J.*—The law of dower has been recognized in this country amongst Europeans and Armenians as a branch of the law of inheritance, and estates which have been held by British subjects under the name of freehold estates of inheritance, are, in all essential respects, the same estates which have been held in England under the same name.

The case of *The Mayor of Lyons* v. *The East India Co.*, 1 Moo. I. A., 175, does not decide that the Courts of this country are justified in adopting just so much of the law of inheritance, or of dower, or of any other law, as they consider equitable, and rejecting the rest. It only points out that there are certain portions of the English Statute law which from their very nature were only passed for reasons connected with England, and which would not be applicable in India or any colony of the British Crown,—*e. g.*, the Mortmain Acts, the law of aliens and the like.

The provisions of Section 4 of the Succession Act are prospective and leave rights unaffected which had already been acquired before the Act passed.

Per PONTIFEX, *J.*—The true construction of Section 17 of 21 Geo. III, C. 70, must confine the words "their inheritances"

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There is, so far as I can find, no express authority upon the question. It must, therefore, be dealt with upon consideration of principle.

The plaintiff's claim is founded upon two propositions,—1*st*, that, by the law of England, a widow would, under like circumstances, be entitled to dower; 2*nd*, that the law of England governs the present case.

The first of these propositions is no doubt correct. The question is as to the second. It is often said that the law administered by this Court is, except in certain matters affecting Hindus and Mahomedans, and except so far as statutory provisions have modified it, the Common Law of England as it existed in 1726. But this statement, though, no doubt, in general sufficiently accurate, is not absolutely correct. The true principles to be followed by this Court, when called upon to apply a rule of English law not previously applied, are clearly laid down by the Judicial Committee in *The Mayor of Lyons* v. *East India Co.*, 1 Moore's I, A., 175.

The questions to be answered in each case are stated at page 272:—"Has the English law (upon the point in question) been introduced?" "If that law has never been introduced, has there been such an introduction of the English law generally, that those parts which have been introduced draw along with them the law in question?"

The rule of English law which the plaintiff in this case seeks to apply has, certainly, not been introduced into Calcutta by any express declaration; nor, so far as I can learn, has it ever been sanctioned by any judicial decision. I cannot find any trace of it throughout the whole period during which the Supreme Courts and the High Courts have existed in the Presidency towns.

Has then any branch of English law been so generally introduced as by reasonable implication to carry this law with it? I think not.

There is authority for saying that the English law of inheritance to real estate was introduced: *Gardiner* v. *Fell*, 1 Moore's I. A., 299, and *Freeman* v. *Fairlie*, 1 Moore's I. A., 305. The rule that the heir-at-law takes subject to the widow's right to dower, may well be regarded as a rule of the law of inheritance. And accordingly, in some of the cases cited at the bar, the Supreme

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assigned to them. The law of dower is not of feudal origin Its origin is uncertain: Petersdorff's Abridgment, Tit. Dower, but it was in existence before the conquest, and was in fact abridged by the feudal law. It attaches in England to lands of gavelkind and borough English tenure. The question is whether the law of dower was introduced into this country; and if so, what law was it? English, or what other? The only law of dower we know is the English law, and its existence has been repeatedly recognized in these Courts. The only law applicable to British subjects other than Hindus and Mahomedans is the English laws: *Emin* v. *Emin*, 1 Morley's Digest, 300, Montriou's Morton, 242; *Stephen* v. *Hume*, Fulton, 224; *Musleah* v. *Musleah*, Fulton, 420; 1 Boulnois, 240; *Joseph* v. *Ronald*, Morton, 111; *In the goods of Cachick*, 1 Morley, 375, Morley's Introd., pp. 187, 298. There is no case which expressly decides that dower will attach as against a purchaser; but in *De la Cruz* v. *Gooruckand Seal*, Clarke's Add. Rules and Orders, 335, the Court considered that it would. [GARTH, *C. J.*—If we are to apply the law of dower at all, why should we stop at a particular point and refuse to apply it in its entirety? PONTIFEX, *J.*—Was the husband seised?] The conveyance recites that he is seised and possessed of the property as and for an estate of inheritance in fee-simple. The learned Judge admits that dower attaches as against the heir, but refuses to extend the law on the authority of the *Mayor of Lyons* v. *The East India Co.*, Moore's I. A., 272. But that case is based on *The Attorney-General* v. *Stewart*, 2 Mer., 160, which shows that laws having only a local effect, and applicable only to England, such as the Mortmain Act, are not to be considered as introduced into a colony. Dower does not come under this class of cases. The reasons given in the *Attorney-General* v. *Stewart*, 2 Mer., 160 were followed in *The Advocate General of Bengal* v. *Ranee Surnomoyee*, 9 Moore's I. A., 387. That lands in Calcutta are freehold of inheritance appears from *Gardiner* v. *Fell*, 1 Moore's I. A., 340, and *Freeman* v. *Fairlie*, 342.

[He was stopped by the Court.]

Phillips.—There is no evidence that this is an estate of inheritance in fee-simple. The recital in the deed is not evidence against my client. It is merely the vendor's statement of his own

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estates of inheritance. [PONTIFEX, *J.*—In England real estate m be assets in the hands of executors for the payment of debt *Robinson* v. *Lowater*, 17 Beav., 592; 5 D. M. G., 272. The must be a legal estate of inheritance in fee-simple in ord that dower may attach. No case decides that such an esta exists in India. That point was not decided in *Freeman* v. *Fairli* 1 Moore's I. A., 612, the only question there was, whether a wi attested by two witnesses passed land: it was enough to consid where the estate was to go, whether to the legal personal repres tatives or heir. The fact that it was customary to levy fines to b dower does not prove that fee-simple estates existed, but mere that it was thought advisable to take precautions to prevent th widow from claiming. The right to dower was swept away by th Succession Act. Section 4 provides that no person shall by mar riage acquire any interest in the property of the person whom h or she marries; and Sections 25—28 provide for the widow in case intestacy. [GARTH, *C. J.*—Dower has the effect of a settlement the marriage; it is a charge which the husband cannot alien without the consent of the wife.] It cannot have been intend that a widow should get her dower and also the provision un the Act. [He also referred to Section 17 of 21 Geo. III, C. 70.

Agnew, in reply, referred to *Nekram Temadar* v. *Iswari Pra Pachuri*, 5 B. L. R., 613; *Jogadamba Dasi* v. *Grob*, 5 B. L. R., 6

The following judgments were delivered by the Court (1):—

GARTH, *C. J.*—The plaintiff is the widow of an Armen gentleman, to whom she was married in the year 1837; and claims, in this suit, to have her dower assigned to her o certain lands in Calcutta, which belonged to her husband at time of the marriage, but were afterwards sold by him to Bungshee Dhur Dutt and Nobin Chunder Dutt by an indent dated the 9th of May 1866.

The defendants' title is derived from the purchasers u that deed; and their contention, stated broadly, is, that the En law of dower is not applicable to a case of this kind.

The learned Judge in the Court below appears to have sidered, that although lands held by Armenian subjects in Ca are subject generally to the English law of inheritance

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same way as they have been in England. They have been b and sold as such. They have been transferred from hand to by modes of conveyance which are only applicable to E tenures, and meaningless as applied to any other tenures. have been considered and treated as such by the Supreme since its first establishment; and they have been made the s of real actions, which we all know constituted a machinery inappropriate to any other than English tenures. And lastly have over and over again been recognized and dealt with as by the Indian legislature.

In fact, if Mr. Phillips's argument is well founded, it to me, that not only proprietors of land themselves, but als legal profession, and the Courts of law, and the legislature, all for years past been labouring under a very serious mistake

So long ago as the year 1815, we have the direct author the Supreme Court in the case of *Emin* v. *Emin* (Mont Morton, p. 212), deciding—

1*st*.—That the English law of dower was at that time r nized, and enforced here as it was in England; and 2*ndly*, Armenian subjects of the British Crown resident in Calcutta amenable to that law.

In that case a bill was filed by the widow of an Arm against the heir-at-law (being the eldest of two sons o deceased husband), praying to have her dower assigned. husband was also an Armenian; and the lands out of whic dower was claimed, and *of which the husband was alleged t been seized for an estate of inheritance in fee-simple*, were fo most part within the town of Calcutta, though a small porti them were situated in a neighbouring mouzah.

A decree was made in favor of the plaintiff by Sir E Hyde East and Sir W. Burroughs, that the dower shou assigned by a Commissioner in the usual way; and a final was subsequently made confirming the commissioner's report Court which consisted of Sir Edward Hyde East, Sir F Macnaghten, and Sir Anthony Buller.

From that time to the present, as far as we know, th rectness of this decision has never been questioned, and we the further evidence that the law of dower was fully recog

from the fact that a large number of fines have been produced before us from amongst the records of the Supreme Court, which have been levied from time to time *for the express purpose of barring dower.*

Then we have the Dower Amendment Act of 1839, passed by the legislature of this country, corresponding in most of its provisions with the Dower Amendment Act in England, the 3 and 4 Wm. II, C. 105.

If the contention of the defendants were right, there could have been no such thing in this country as the law of dower, because there were no estate to which that law could legally attach. But the preamble of this Act distinctly affirms the existence of that law in India, and the necessity for amending it, as it had been amended in England.

The various sections of the Act treat of the doctrine of "seisin," of "rights of entry," and of "equitable," as distinguished from "legal estates of inheritance" in language which would have no meaning, unless the English law of inheritance prevailed in this country.

It seems to me, therefore, that even if we entertained any doubt upon the subject, which I certainly do not, it would not be possible for us at the present day to ignore the existence of a law thus distinctly affirmed, both by the Supreme Court and the legislature. As a matter of principle, there would seem to be at least as much reason, why amongst British subjects in India a provision should be made by law for a wife's maintenance as in England. And if this principle is conceded, it is difficult to see why a wife should have less power of enforcing her rights against a purchaser from her husband than she had in England.

It then being once established that the law of dower has prevailed in this country, we have no right, as it seems to me, to contest or modify that law according to our own notions of justice, we must administer it in its integrity; and we have no more right to deprive the plaintiff of the benefit of it by holding (contrary to its well-known rules) that her husband could deprive her of her dower, by aliening his lands to a stranger, than we should have to hold, that a tenant for life or in tail might sell the inheritance absolutely, to the prejudice of the reversioner or remainderman.

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Besides, it seems to me, that Section 4 of the Dower Amendment Act is itself an authority, that, before the Act, a husband could not alien or devise his lands so as to deprive his wife of her dower. That section purports to *deprive a wife of her a right to dower in lands, which may have been aliened or devised by her husband in his lifetime*, which means, if it means anything, that in the view of the legislature, a wife, before the Act, *had right* to dower in such lands. The section would not only be superfluous, but misleading, unless the wife had such a right.

The learned Judge in the Court below has alluded to the judgment of the Privy Council in the case of the *Mayor of Lyons* v. *The East India Co.*, 1 Moore's I. A., 231, as affording an authority, that the English law of inheritance was not introduced here in its entirety, but only so much of it as was applicable to the state of things in India. But that case, as I read it, does not mean to decide that the Courts of this country are justified in adopting just so much of the law of inheritance or of dower, or of any other law, as they consider equitable, and rejecting the rest. It only points out, that there are certain portions of our English Statute law, which from their very nature were only passed for reasons connected with England, and which would not be applicable to India, or any other colony of the British Crown, as for instance, that Mortmain Acts, the Law of Aliens, and the like.

That part of the law of dower, which we are called upon to administer in this case, is obviously quite as necessary to the due enforcement of the wife's rights in India, as it would have been in England.

Then it was suggested, rather than argued, by the defendadt's counsel, that although as against a European or any other purchaser (except a Hindu or Mahomedan), the wife might enforce her rights, Section 17 of 21 Geo. III, C. 70, prevents her from enforcing them as against a Hindu purchaser.

That section enacts as follows:—

"Provided always, and be it enacted, that the Supreme Court of Judicature at Fort William, in Bengal, shall have full power and authority to hear and determine in such manner as is provided for that purpose, in the said Charter or Letters Patent, all and all manner of actions and suits against all and singular the inhabitants

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The only remaining point argued by Mr. Phillips was a somewhat technical nature. It is not noticed in the jud of the lower Court, and was evidently considered of no w and if I thought there was anything in it, I should certainly been disposed to allow the plaintiff to call additional evidence

It is said that there was no sufficient proof in the Cou low that the husband's estate in the property in question w estate in fee-simple.

Mr. Phillips called no evidence on this point, nor offe call any; nor did he pretend to say that the estate whic client's ancestors had bought from the plaintiff's husband was than an absolute estate, which is known here by the nam fee-simple. His bare contention was, that the plaintiff was to prove that the estate sold was an estate of inheritance, and she had failed in that proof.

The conveyance, however, under which the defendant c and which was put in by the plaintiff, contains a recital tha vendor "*is seised of, or otherwise well entitled to, the pr intended to be sold for an estate of inheritance in fee-simple,*' *it purports* to convey that estate to the purchasers.

Although, therefore, as between the plaintiff (who w party to the deed) and the defendants, there was no estoppel, would prevent the defendants from proving that the estat was other than an estate in fee-simple, yet as the purc bought the property as and for an estate of inheritauce, and for it as such, I consider that is clearly *primâ facie* evidence them and the defendant as claiming under them, that tha was what it purported to be.

It is one of those admissions by conduct of parties amounts to evidence against them. If a written contract w between buyer and seller with regard to the purchase of that contract (quite apart from any question of estoppel) *primâ facie* evidence as against both buyer and seller thing sold was a horse. It would of course be perfectly o for either of them to show that the thing sold was *not* but *primâ facie* their contract and their conduct would be the other way.

I am of opinion, therefore, that as against the l

possession of the defendants, the plaintiff is entitled to have her dower assigned, and that the usual decree should be made, appointing a commissioner for that purpose.

I think also that the plaintiff ought to have her costs in this Court and in the Court below on scale 2.

PONTIFEX, *J.*—I also am of the same opinion. The very learned argument of Mr. Phillips might had have some weight in a bygone age dusty with the lore of Fearne and Preston. But it seems to me, for the reasons stated by the CHIEF JUSTICE to be now of purely antiquarian interest; and even if it could have had any successful issue before the Courts, and the legislature had, as Mr. Phillips argues, been misled by a false analogy, it is now propounded unfortunately about a century too late.

I will add one word with respect to Section 17 of 21 Geo. III, C. 70. It seems to me, though the language is a little confusing, that the true construction of the Section must confine the words "their inheritance and succession" to questions relating to inheritance and succession by the defendants. The present is a question of the plaintiff's succession, and therefore not determinable by the laws and usages of the Gentoos.

GARTH, *C. J.*—A question has been raised between the parties upon this judgment, from what time the defendants are bound to account to the plaintiff for the profits of the property. We find that in the case of *Emin* v. *Emin*, 1 Morley, 300; Morton by Montriou, 242, an account of the profits was ordered from the death of the plaintiff's husband; and probably in a suit for dower against the heir or devisee of the husband, that would be the ordinary rule. But in the present case, it does not appear that the defendants had any notice, until the suit was brought, that the plaintiff claimed her dower out of the property in question. She might reasonably have supposed that she had no such claim; and we think that it would be unjust, under such circumstances, to order an account against them prior to the date of suit.

The decree, therefore, will direct an account of the profits to be taken in the usual way from that date.

[CIVIL APPELLATE JURISDICTION.]

1881. *Jan. 24th.*

No. 717 of 1879.

KALI CHURN SAHU AND OTHERS, (PLAINTIFFS).. APPELLAN

AND

SECRETARY OF STATE, (DEFENDANT)..... RESPONDE

Diluvion—Constructive possession—Adverse possession—Lopez's ca Onus of Proof—Limitation Act IX of 1871, *Schedule II, Arti* 141-2-3-5—*Continuance of possession.*

Where in a suit for possession of jungle land or of land wh has been diluviated and which is alleged to have been wrongfu taken possession of by the defendant, the plaintiff gives *primâ fa* proof of his title, the *onus* is upon the defendant to show tha (the defendant) has acquired a Statutory title by a 12 years' adv possession which has put an end to the plaintiff's right.

Radha Gobind Roy Saheb v. *Inglis*, 7 C. L. R., 364 follow *Maharajah Koowar Singh* v. *Nund Lall Singh*, 8 Moore's I. 199 distinguished.

Possession under a *bonâ fide* claim of right existing at the of the land becoming diluviated will be presumed to continue ing the period of submersion.

WHITE, *J.* :—The dispossession, or discontinuance of poss mentioned in art. 143 of the Limitation Act, IX of 1871, is which occurs where the property is taken actual possession of, capable of being taken such possession of, by another, and do apply to the case where the property is submerged by the God, and so made impossible of occupation or actual poss * * * * Owners of land, which has suffered from successiv viations and re-formations, must, if they wish to preserv rights, bring their suit within twelve years of the time wh verse possession is first taken of land re-forming on the site, whether at the time of suit the land is capable of occ or lying under water in consequence of a second diluviation.

APPEAL from a decree made by the District Judge of pore, dated the 16th January 1879 affirming the decree of ordinate Judge of that District, dated the 13th May 1878.

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certainly seems reason for supposing, that so far as the original
is concerned, the plaintiffs have a good case; but as it is found
they have not been in possession for upwards of 12 years before
both Courts have held that their suit is barred.

On second appeal to this Court, as the learned Judges of
Division Bench differed in opinion the case was referred to my
as a third Judge, and we have heard the whole matter argued ag
on both sides.

The plaintiffs contend on the one hand, that even if it is sho
that the Government took possession of the land in question
viously to 1875, they did so as trespassers; and that as the
was diluviated again in 1869, their possession as trespassers
ceased, and the true owners of the property must be considered
having been in possession from that time till the Government ag
took possession in 1875. They contend, that strictly speaking,
one can be considered as in actual possession of land covered
water, and that no suit could have been brought by the plain
against the Government from 1869 to 1875; but that if any
is to be considered in point of law as constructively in posse
whilst the land was diluviated, it is the true owner, and not a p
who previously to the diluvion was a mere trespasser upon the
perty.

They say, moreover, that apart from the question under
Limitation Act, the proceedings of the Collector in 1875 were i
perly received in evidence in both Courts against the plaint
proving that previous to 1865 the Government had taken pos
of the property, these proceedings not being evidence again
plaintiffs who were not parties to them.

On the other hand the defendant says, that as the Gover
was found to have held undisturbed possession from 1865 to
under a claim of right, their possession did not cease at t
when the land was diluviated in 1869, but must be presu
have continued until it re-formed in 1865; that during all t
the plaintiffs might, if they pleased, have brought a suit
the Government to recover possession; and that consequen
possession of the Government has been continuous from the
ning of 1865 to the present time. They contend, moreo
having regard to the strict language of Articles 143 and 1

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posed to be their Lordships' view; see *Syed Ameer Ali* v. *Maharani Inderjeet Koer*, 15 W. R., 43; *Niljaree* v. *Mujeebollah*, 19 W. R., 209; *Koomar Runjit Singh* v. *Schoene, Kilburn*, 4 C. L. R., 390 and *Mahomed Ibrahim* v. *M. B. Morrison*, I. L. R., 5 Cal., 36. Some of these cases appear to have turned rather upon the question on whom the *onus* of proof lies in a suit for dispossession, than upon the question, whether the possession of an owner of diluviated land is presumed by law to continue during the period of the diluvion. But the two questions are often almost inseparable in cases of this kind, and it certainly seems rather difficult at first sight to reconcile the above case in 8 Moore's I. A., 199, with the late decision in *Radha Govind Roy* v. *Inglis*, C. L. R., 364, which as it seems to me, lays down the true rule upon the subject very clearly.

In the case of Maharajah Koowar Singh the plaintiff brought his suit to recover a large tract of land, which as he contended, had been adjudged to be part of his estate of Gopalpore by certain decrees made in suits between his own and the defendant's ancestors in the year 1816. The defendants on the other hand contended, that by those very decrees the land in question had been adjudged to be part of their estate of Rampore. There was considerable difficulty in ascertaining which of the parties was right in this contention, but it was admitted that as regards possession, the defendants had been possessed of the disputed land for at least 11 years before suit, and the plaintiffs had not proved to the satisfaction of the Court that they were in possession within 12 years before suit. The Law of Limitation in force when the suit was brought was the Bengal Regulation III of 1793 Sec. 16.

Upon this state of facts their Lordships say—

"Again, their Lordships concur with the majority of the "Sudder Court in thinking that the issue of possession is the first "to be considered in this case, and that it is wholly independent "the boundary question. The appellant is seeking to disturb the "possession, admitted to have existed for about 11 years, of defendants, who insist on a possession of much larger duration "statutory bar to the suit. It clearly lies on him to remove the "bar by satisfactory proof that the cause of action accrued to him "(for that is the way in which the Regulation puts it) on a dis-

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"occupied by the defendant for twelve years before the su
"instituted, so as to give him a title against the plaintiff
"operation of the Statute of Limitation. On this question un
"edly the issue is on the defendant. The plaintiff has prov
"title; the defendant must prove that the plaintiff has los
"reason of his, the defendant's adverse possession. The
"Court came to the conclusion that the defendant had not s
"the burden of proof thrown upon him, and their Lordships
"prepared to reverse that judgment."

Now here, as in the case of *Mokarajah Koowar Singh* t was brought *as upon a dispossession by the defendant.* The tion Act which governed the case was Act IX of 1871; and not aware that there had been since the year 1846 any ch the law as to the party upon whom the *onus* of proof lies in case, or as to the nature of the proof, which a plaintiff b such a suit is bound to bring forward.

The distinction as I conceive, between the two cases i In the case of *Mokarajah Koowar Singh, the plaintiff h proved any possession at all of the land in dispute at a before suit.* He had only attempted to prove *a title to it* un decree of 1816. And their Lordships say, that even if proved such a title, there was no proof of his possession either or constructive within 12 years before suit. Whereas in the Radha Govind Roy, the plaintiff not only proved his title, possession of his ancestor which was equivalent to a po in himself; and that possession presumed by their Lordships continued until the dispossession by the defendant; so t *onus* was thrown upon the defendants to prove when their session first occurred.

I am aware that the view of the law is opposed to decisions in this Court; but I think that these cases have upon a misapprehension of the true meaning of the Privy I consider myself bound to follow this last decision of th ships, which I trust will set the question at rest; and it seems to me that any other view must needs be productiv greatest injustice.

Take for example the case of an area of jungle land, man buys and takes possession of by going upon the la down boundary marks, or the like. He does nothing mo

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turn he finds a wrong-doer in possession, and brings a suit to him. It seems to me, that it would be under such circumsta a monstrous injustice to say, that the burthen of proving ex when the defendant took possession should be thrown upon plaintiffs.

In my opinion, therefore, if the plaintiffs in this case c have proved, that the land in question formed part of their mou and that they were in possession of it before it was diluviated, diluvion, although it lasted for more than 12 years would not h affected their rights, if the dispossession by the defendant t place within 12 years before suit.

The plaintiffs' difficulty here is, that their dispossession by Government is found by the Lower Courts to have taken plac 1865 or earlier; at any rate, more than 12 years before suit; if that finding is correct, unless they can shew that they h since resumed possession either actually or constructively, it se to me, that their claim is barred.

But their contention is, that if the Government were in wrong-doers, whilst they remained in possession from 1865 1869, no presumption ought to be made in favor of their posse continuing after the land became diluviated, as if they had b the rightful owners.

But it seems to me very difficult to act upon that prin If the Government had merely committed a casual act of tre that would not have had the effect of permanently disturbi discontinuing the plaintiff's possession. But if what they amounted to putting the plaintiffs, the true owners, out of p sion, and they kept possession themselves under a claim of for so long a period as 4 or 5 years, I see no reason why t of the land becoming diluviated, should be considered as p an end to their possession. If this were the law, it would most important effect upon many titles in Bengal, which are ed upon adverse possession, because we all know that large of land are always more or less covered with water duri rainy season; and if the fact of their becoming thus cover water had the effect of putting an end to the possession person, other than the true owner, and of restoring the tru to possession during the time that the submersion cont would cause a very material change in the law of limitatio

I think, therefore, that if the Government were in possession under a *bonâ fide* claim of right at the time when the land became diluviated in 1869, their possession must be considered as continuing up to the time when they resumed actual possession, and therefore virtually up to the commencement of this suit.

It follows, that if the Government did actually take wrongful possession of the land in question more than 12 years before suit, the plaintiffs are barred, whether the case comes under Article 143, or Article 145 of the Limitation Act. If it comes under Article 143 the plaintiffs *were dispossessed* more than 12 years before suit; if it comes under Article 145, the possession of the Government *became adverse* more than 12 years before suit.

There are some points, however, in this case, which in my opinion the Lower Courts, and especially the Lower Appellate Court, do not appear to have tried satisfactorily; and as the plaintiffs desire to have those points considered and decided, I think they are entitled to a remand for that purpose.

It should be distinctly ascertained by the Lower Appellate Court in the first place whether the land in dispute or any and what portion of it, formed part of the plaintiffs' mouzah; and in the next place, whether the Government took possession of that land or any and what part of it so long ago as 12 years before suit.

The plaintiffs are clearly entitled to any part of the property in question, which belonged to their mouzah, and which cannot be distinctly proved by the defendant by legal evidence to have been taken possession of by the Government at least 12 years before suit.

For the purpose of ascertaining these facts the proceedings before the Collector are clearly not admissible as against the plaintiffs. The plaintiffs were no parties to them, and those proceedings were improperly admitted as evidence in the Court below. The Lower Appellate Court will be at liberty to receive any fresh evidences that may be advanced by either party on the above points.

If the plaintiffs establish their right to recover the land in question or any part of it, they will be entitled to costs from the defendant proportionate to the quantity of land recovered in all the Courts including the High Court.

If the plaintiffs can prove that the land in question or any substantial part of it formed part of their mouzah, and they are

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defeated upon the plea of limitation only, each party wi own costs in this Court and in the Lower Appellate Cour in that case it will be clear that the Government have be fully appropriating land, which belongs, properly speal plaintiffs *and for which the plaintiffs have been paying* them up to the present time. This would undoubtedly injustice to the plaintiffs, and the attention of the proper might with good reason be invited to the subject.

On the other hand, if the land in question never f part of the plaintiff's mouzah, it is only right that th should pay the defendants costs in all the Courts.

WHITE, *J.*:—This is an appeal against a decree of t Judge of Bhaugulpore, confirming a decree of the Moon has dismissed the suit of the Appellant.

The object of the Appellants' suit is to recover po certain chur land on the ground that it had re-formed on a portion of milik land within their mouzah Ghurgal an the north of the mal land of the same village. The land is stated in the plaint to be 139 bighas 14 cottahs an but on measurement the Ameen of the Tirhoot Court h to be 140 bighas 3 cottahs 6 dhoore. The appellants all does not appear to be disputed, that since the diluviation continued to pay revenue to Government for the whc milkiat land in Ghurgal.

The Officiating Collector of Monghyr on behalf of th of State for India, who is the respondent, and the defend alleges that the land in suit does not form part of the of the plaintiffs' mouzah Ghurgal, but is parcel of mo Deara which belongs to Government. He further plea plaintiffs are barred by the law of limitation. Both Courts have held their suit to be barred.

The specific land, which is sought to be recovered did not appear as dry land until 1875; and as this suit on the 5th September 1877, no question under ordina stances could be raised founded on the law of limitation. also admitted that upon the site of the land in suit, la the same extent had previously appeared and been wa In other words, the site of the disputed land has been th a double diluvion and a double re-formation of chur l

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re-formed in 1875. It appeared to me that as the possessi Government took of the land which re-formed on the site p to 1865, was the possession of a wrong-doer, Government c avail itself of the doctrine of constructive possession in connect its possession of the first re-formation in 1865 with session of the second re-formation in 1875; and that its p of the first re-formation was in fact swept away or put a by the second diluviation. I was struck with the appare ship which was involved in a construction of the law of li which should permit a wrong-doer who might have held p of a newly formed chur for only a year before it was again away, to oust the true owner in the event of land subseque formed a second time, although an interval of 20 or mo might elapse before the second re-formation took place. It to me contrary to justice that a wrong-doer's possession sh ripen, as it were, under the water into a title, although h and possible occupation of the land in question only conti a year.

But after hearing the case re-argued and having the ad of reading the judgment which my Lord is about to deliver come to the conclusion that my first opinion was wrong, an the law of limitation is at present framed by the Legislatur that law has been construed by this Court, Government case before us entitled to date its adverse possession of the suit from the period when it first took possession of the lan first re-formed upon the present site.

Assuming as I do for the purpose of the argumen question of limitation that the land in suit on both occa formed on the site of the plaintiff's diluviated milkiat l land although under water, continued after the first diluvi the constructive possession of the plaintiffs until Governm possession of the lands which first re-formed on the site. of Government was admittedly an adverse act as against t tiffs and put an end to their constructive possession. U suit was brought, the plaintiffs did not act with a view t possession and the adverse possession of Government, whi menced when it occupied the lands first re-formed, must be co as continuing until this suit was brought although for 6 the time its actual occupation ceased by reason of the seq

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It appears to me unnecessary to determine whether ient, if a wrong-doer when it first took possession, could be ave constructive possession during the period of the second on. It is enough to say that the time began to run against ıtiffs when Government first took adverse possession, and he plaintiffs have not resumed or recovered possession before ontinued to run according to the ordinary law of computa- period of limitation and this irrespective of whether the s or was not capable of occupation by reason of its sub-

result of our decision will be that in similar cases to the owners of land which have suffered from successive diluvia- l re-formations must, if they wish to preserve their rights, eir suit within 12 years of the time when adverse possession ıken of land re-forming on the original site, whether at the suit the land is capable of occupation or is lying under consequence of a second diluviation. I have not in my ce known of a suit of this character being brought, where in dispute at the time of suit had disappeared and formed he bed of a river, and I can foresee many difficulties in the such a suit chiefly arising from the difficulty of iden- ands which are at the bottom of a river. But there is no at such a suit would lie, and so long as land which is exposed sive diluviations and re-formations is subject to the ordinary imitation, it will be a matter of prudence to bring such a

gree that the case should be remanded to the Lower Appel- ırt to try the questions mentioned in the judgment of the ıstice.

CLEAN, *J.* :—In this suit the plaintiff claimed 139 bighas ıhs 6 dhoore of land which he alleged to be part of his ıilik Ghurghat. He stated that the greater portion of te had diluviated before the "former survey," that is, before Before the next survey of 1865 accretion had commenced was washed away in $\frac{1273\ F.}{1865\text{-}66}$. The present land commenced rm in $\frac{1278\ F.}{1870\text{-}71}$ and became culturable in $\frac{1282\ F.}{1874\text{-}75}$. This suit has, re, been brought against the Government for possession of the The cause of action being laid in the last mentioned year.

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The Government denies that the land is a portion of th
mill mouzah Gheoghat as laid down in the survey of 184
case put forward by Government is, that the Ganges, w
1847 flowed south of mouzah Gheoghat changed its course
and intersected the Government estate of Binda Deara, and
channel so led and the land in suit came into the posse
Government as part of Binda Deara and was surveyed as p
in 1865. It is admitted that the land again disappeared i
and re-appeared in 1874, but it is urged that the land now s
is identical in site with the land which was held by Gove
from 1861 to 1865.

The first Court found that 125 bighas 14 cottahs 19
cct of the land is identical in site with the land surveyed i
as part of the Government estate of Binda Deara and found
the possession of the tenant of Government. It also found t
remainder is part of Binda Deara and is not part of plaintiff
of milk Gheoghat. The possession held by Government i
is found to have been adverse to plaintiff and his suit declar
barred by the first Court and also by the Lower Appellate C

In this Court it is contended that, taking it as found t
land is identical in site with the land in the possession of
ment in 1865, plaintiff is entitled to prove that it is part of hi
and re-formed upon its old site, and that his cause of acti
only be said to have commenced when the last re-formati
menced.

This contention is entirely unsound, if it is establish
the land held by Government down to 1865-66 is identica
with the present land. If that land was re-formed on th
plaintiff's estate as it existed in 1847 or earlier, the plai
undoubtedly the owner of it and entitled to take possession
re-appeared in 1861 or 1862. This was laid down as fa
1848 in the case of *Mussamut Imambandi* v. *Hargovin*
4 Moore's I. A., 403 and again in *Ramanath Thakur* v.
Narain Chowdhry, Marshal, 136 in 1862, *Lopez* v. *Muddo*
Thakur, 13 Moore's I. A., 467, decided in 1870, affirme
laid down in these cases. Plaintiff, therefore, was e
take steps to assert his title and to rectify the survey
1865, but failed to do so. This neglect is not ex
any way, and we find that the proprietor of mouzah

[CRIMINAL REVISION.]

1881 April 7. IN THE MATTER OF J. A. TEUSSIN ..... PETITIONER

v.

[illegible]—[illegible] Act IV of 1877, [illegible]

An order of a Presidency Magistrate under section 32 of the Telegraph Act does not operate as a bar to a trial for the same offence by the presentation of a fresh complaint.

RULE obtained by the order of Mr. Gupta, one of the Presidency Magistrates of Calcutta, convicting the petitioner under section 24 of the Telegraph Act (XIII of 1876), and sentencing him to pay a fine of Rs. 100 or in default to undergo simple imprisonment for one month. The fine was paid.

It appeared that the charge upon which the petitioner had been convicted had been the subject of a former complaint, which had been dismissed by the same Magistrate on account of the non-attendance of the complainant under circumstances which will be found stated at length in the judgment of Mr. Justice PRINSEP.

It was contended for the petitioner that the order of dismissal amounted to an acquittal, and that the subsequent proceedings were therefore illegal.

Baboo [illegible] for the petitioner.

The following judgments were delivered by the High Court (1):—

PRINSEP, *J.*:—On a complaint made before the Presidency Magistrate under section 32 of the Telegraph Act a summons was issued on the 4th September last, fixing the 15th for the trial. The complainant and two witnesses (the Telegraph clerk and peon) were then examined and apparently to enable the complainant to prove that he had purchased the good will of the firm who were the addressees of the undelivered telegram the trial was postponed to

(1) MORRIS & PRINSEP, *JJ.*

1881.

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Judgment.

the 22nd, summons being granted to procure the attendance of Mr. C. T. Davis, an officer of the High Court, at 1 P. M. of that day.

The case was called on toward the commencement of the Presidency Magistrate's sitting, and the complainant being absent "when his name was called six times," the case was dismissed. Within a very short time the complainant appeared accompanied by Mr. Davis. The Magistrate at once saw the unfortunate result of his precipitate action and thinking that he could not revive the trial, adopted an alternative course and directed the complainant to bring a fresh complaint. This was done on the following day; the accused was again summoned, the trial was held on the 20th October, and on the 25th he was convicted and sentenced to pay a fine of Rs. 200.

The matter has now come before us under section 147 of the High Court's Criminal Procedure Act, X of 1875, it being contended that the order of the 22nd September last dismissing the case amounted to an acquittal, and that on the facts found by the Presidency Magistrate the accused has been wrongly convicted under section 22 of the Telegraph Act.

I observe that the Presidency Magistrates' Act, IV of 1877, practically provides for only one mode of procedure in the trial of offences before a Presidency Magistrate, no distinction being drawn between cases which are appealable to the High Court, and those in which the Magistrates' orders are final, except in the manner of recording evidence (section 115), the preparation of a charge (section 116), and in the addition to an order of conviction and sentence which is appealable "of a brief statement of the reasons for the conviction" (section 126)). It seems, therefore, that the sections of the Act which provide for an order dismissing a complaint apply equally to all trials held by a Presidency Magistrate.

The exact effect of an order of dismissal is not declared, except in a case dealt with under section 32, *i. e.*, when, after examining a complainant, the Magistrate considers that "there are no sufficient grounds for proceeding." In such cases it is expressly provided that "the dismissal of a complaint shall not prevent subsequent proceedings against the person complained against."

The Act, however, permits a magistrate to dismiss a complaint

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in consequence of the absence of the complainant at the c ment of the proceedings, and upon the day appointed appearance of the accused person, or on any day subseque on which the case may be called on" (section 118), or on which the hearing may have been adjourned, "in order tc attendance of witnesses or for any other reason." (Sectio both instances, it is left to the discretion of the Magistra dismiss the complaint, or again to adjourn the hearing determine whether he should impose upon the compl extreme consequences of neglect to attend, or whether adjournment should be granted.

Mr. Branson, who supports the rule granted in argues that as section 32 provides that an order of dismi under certain circumstances shall be no bar to further p it must be presumed that it was intended by the Legisl in all other cases, such an order shall have the same ef acquittal.

On the other hand, Baboo Gooroo Dass Banerjee cor considerable force that an order of acquittal can be pa under section 126, when in a trial the Magistrate finds t person not guilty, that the law declares that it is only wl plaint is withdrawn with the permission of the Magistra 125), that any other order operates as an acquittal of t person, and that this is borne out by the terms of section

It is to be regretted that the Legislature, having p before it the precise terms of section 212 of the Code c Procedure, left any doubt regarding the exact effect of a dismissal passed by a Presidency Magistrate. Howev carefully considered all that has been said on both sides, of the law, and the inference that may legitimately be d any omissions as already noticed, I am of opinion, that dismissal under section 124 does not operate as an acqui accused. No inference can, in my opinion, be properly c the express terms of section 32, that in all other cases a dismissal "shall prevent subsequent proceeding against complained against." The rule that *expressio unius e alterius* cannot be applied where in subsequent secti (section 126) has provided that an order of acquittal sha

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"*if in any case tried*" by a Magistrate he finds "the accused person not guilty, with only one exception, *i. e.*, where a case has been withdrawn with the Magistrate's permission (section 125), and when section 113, in providing for the plea *autrefois acquit*, declares that it shall only be raised when a person has "once been *tried* for an offence, &c., &c." We have, I observe, no definition of what constitutes a trial such as is conveniently given in the Code of Criminal Procedure, but it seems clear to me that when all the evidence which is required by a Magistrate is, as we have in the case before us, not given, and when the Magistrate dismisses the complaint on account of the absence of the complainant before the time fixed for the recommencement of the hearing, and the production of that evidence, it cannot be said that the trial has been completed.

Some remarks have been made regarding the inconvenience which would arise if an accused person, after the dismissal of the complaint, were again required to attend to answer it, but it appears to me that, on the renewal of the complaint, the Magistrate can, before he grants a process, consider under section 32 whether there is any sufficient ground for proceeding, and unless the complainant can satisfy the Magistrate either by reason of the offence complained of being of a serious character, and that the original complaint should not have been dismissed, the Magistrate would be fully justified in declaring that there was "no sufficient ground for proceeding," and in summarily dismissing the complaint.

Under these circumstances, I am of opinion that there was no legal impediment to the institution of fresh proceedings by the presentation of a fresh complaint, and that, therefore, the objection taken before us should be disallowed.

I trust, however, that the injustice which has resulted from the precipitate order of the Magistrate dismissing the complaint, will be a sufficient warning to him to exercise the discretion given to him by the law sparingly. In the present instance, it was an unjust order, not only because the case had been fixed for trial at a later hour, but because the attendance of the complainant does not appear to have been necessary in order to proceed with the hearing. The serious nature of the offence, it being punishable with imprisonment for two years as well as fine, should also have

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made the Magistrate hesitate before he terminated the proc in so summary a manner instead of at least allowing it to be on at a later hour.

As regards the legality of the conviction of the accused on the facts found by the Magistrate, I see no valid ground jection.

I am, therefore, of opinion that the rule should be disc

MORRIS, *J.*:—It is much to be regretted that the Legi have not declared what is the effect of an order of dismissal section 124 of Act IV of 1877. As has been pointed out, th under consideration before the Presidency Magistrate wa which, under the Code of Criminal Procedure, would be c warrant case. There had been already one hearing in the pr of the accused, and evidence had been taken. A second h was fixed for the 22nd September, but though the accused ap on that date, the complainant did not appear, and so, under t cretion allowed him by the section, the Magistrate dismis complaint. It would have been satisfactory had the law n perfectly clear that in such a case, in spite of the accused ap twice to hear, and, if necessary to answer, the complaint against him, and in spite of that complaint being dismisse liable at any future time to fresh proceedings being taken him on the same subject of complaint. In section 32, whic with a complaint being dismissed upon its presentation aft examination of the complainant, a special provision is enter such "dismissal shall not prevent subsequent proceedings the person complained against." And in cases under Chapte relating to the enquiry by the Magistrate into cases triable High Court, express provision is made in the event of the of the complainant, after examination of witnesses in the of the accused. The Act declares, (section 87) that the ab the complainant, except when the offence may be lawfu pounded, shall not be deemed sufficient for a *discharge*, an charge is described as "not equivalent to an acquittal and the revival of a prosecution of the same offence." In lesser gravity under Chapter X triable by the Magistrate when the circumstances are precisely similar, that is wh cused has appeared, and witnesses have been examined, but

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; has absented himself. The words of the section (124) are [agistrate may *dismiss* the complaint." It might reason- erefore, be thought that a distinction is purposely drawn by ;islature between the order to dismiss and the order to dis- and that the former carries finality with it, whereas the es not.

the same time whatever may have been the real intention listinction of terms, and in the absence of any qualifying n to the term "dismiss" in section 124, I am unable to d the other considerations which have been pointed out by ned colleague. The succeeding section 125 deals with the withdrawal of a complaint of a certain description, and an express provision that the withdrawal under this section plaint shall operate as an acquittal of the accused person. stion naturally suggests itself why if the Legislature in- dismissal under section 124 to operate as an acquittal, it make an express provision to that effect as in the case of rawal under the subsequent section. Again section 126 es:—"If the Magistrate, *in any case* tried under this , finds the accused person not guilty he shall record an acquittal. If the accused person is convicted the Magis- ll pass sentence upon him." In the particuler case before Magistrate, on the 22nd September came to no finding at recorded no order of acquittal or conviction. Having o the language of section 119, I understand the trial of the have commenced on the occasion of the first appearance of sed, that is the date fixed for the hearing, and it was not to its legitimate conclusion because of the absence of the nant, a circumstance which is specially contemplated and for in section 124. When, therefore, these sections 124 , are looked at in conjunction with section 113, which pre- hat a person, who has once been tried for an offence and d or acquitted of such offence, shall, while such conviction ttal remains in force, not be liable to be tried again for the ence, the conclusion seems to be that unless the antecedent resulted in a conviction or acquittal, there is nothing in which prevents a person from being tried again for the same Consequently an order of dismissal is not a bar to the

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revival of fresh proceedings. On the merits I agree in thinking that there is no ground in law for disturbing the decision of the Magistrate. There is evidence which goes to show that the accused Thomson did not act "in good faith," that is, "with due care and attention," in retaining and keeping the telegraph message which, on the face of it, was addressed to a rival firm. The rule is discharged.

[CIVIL APPELLATE JURISDICTION.]

1881. *Jany 6th,*

No. 224 of 1880.

MAHOMED KALUN, ... APPELLANT;

AND

DINOMOYEE DASHYA AND ANOTHER,..... RESPONDENTS.

Civil Procedure Code, Act X of 1877, *Section* 560.

When an appeal has been heard *ex-parte*, a re-hearing cannot be granted by the Court on an application under Section 560 of the Civil Procedure Code, except upon legal evidence produced by the respondent of the facts necessary to entitle him to such re-hearing.

APPEAL from an order passed by the Officiating District Judge of Mymensingh.

Mr. *C. Gregory* and Moonshee *Serajul Islam*, for the Appellant.

Babu *Nil Madhub Sen*, for the Respondents.

The facts appear from the following judgment of the High Court (1), which was delivered by

PRINSEP, *J.*:—We think that the order of the Officiating Judge of Mymensingh must be set aside. He granted a re-hearing of an appeal which had been heard *ex-parte* by his predecessor on no evidence such as is required by section 560 of the Code of Civil Procedure. The law requires that if the respondent in an appeal which has been decided *ex-parte*, satisfies the Court, that is, satisfies the Court *by some legal evidence*, that the notice of appeal was not duly served, the Court may re-hear the appeal. In this case there is no legal evidence at all. The respondent did not even depose on solemn affirmation that he had not been duly served with notice. Therefore the order for re-hearing the appeal was a bad order, and must be set aside. The original order of the 17th June will be restored. The appellant will be entitled to costs of this appeal.

(1) MORRIS and PRINSEP, *JJ.*

[APPELLATE CIVIL JURISDICTION.]

BISSESSUR SINGH AND ANOTHER (PLAINTIFFS) ... APPELLANTS; AND GUNPUT SINGH AND OTHERS (DEFENDANTS)..... RESPONDENTS.

1880. *Nov.* 16*th*. No. 677 of 1879.

Civil Procedure Code Act, X of 1877 *Sec.* 12—*Res Judicata.*

Pending the final hearing in appeal of a suit for confirmation of possession of certain land, and for the recovery of the produce of such land alleged to have been carried away by the defendants, the plaintiff brought a suit again asking for confirmation of possession but also for the recovery of the produce which had arisen since the institution of the other suit.

Held, the second suit so far as it sought for the recovery of the produce was not barred by the first suit.

APPEAL against the decree of the District Judge of Shahabad, dated 6th January 1879 affirming the decree of the first Moonsiff of Arrah, dated the 30th July 1878 dismissing the suit.

Baboo *Durga Prashad*, for the Appellants.

Moonshee *Mahammad Yusuf*, for the Respondent.

The facts are sufficiently stated in the judgment of the High Court (1) which was as follows:—

We are clearly of opinion in this case that the decision of the Lower Court cannot stand and must be set aside. The plaintiffs had brought a suit for confirmation of possession in respect of 10 bighas of zeraat lands (which form the subject-matter of this case also) and for the recovery of the value of the produce of one of the plots constituting the aforesaid 10 bighas; the said produce, it was stated in that suit, having been wrongfully carried away by the defendants. That suit was dismissed by the Court of first instance, but it was decreed on appeal on the 10th of December 1877. On the 2nd of April 1878 the suit out of which this appeal arises was brought by the same plaintiffs against the same defendants and it was alleged that while the first suit was pending the defendants dispossessed the plaintiff from the whole of the 10 bighas of land

(1) MITTER and MACLEAN, *JJ.*

1880.

BISSESSUR SINGH v. GUNPUT SINGH.

Judgment.

in suit, and further that the crops that were standing on the land, in the year 1284 when the first suit was brought, on a plot consisting of 5 bighas odd cottahs as well as the crop of the whole 10 bighas of the year 1285 had been wrongfully carried away by the defendants. Upon these allegations the present suit is brought to recover possession of the aforesaid 10 bighas of land and also to recover the value of the produce of the 5 bighas of 1284, and of the whole 10 bighas of the year 1285. The Courts below are of opinion that because at the time when this suit was brought, the former suit was pending in appeal it is barred by section 12 of Act X of 1877. They have accordingly dismissed the plaintiffs' suit.

We do not see how section 12 has any application to the facts of this case. It is quite clear that if the provisions of that section did apply, and if the plaintiff's suit were liable to dismissal upon that ground, great injustice would be done, because the plaintiffs could not obtain any redress in the first suit for any damage done to them since its institution. The language of section 12 is also quite clear, and from it it is evident that it is not intended to apply to a case like the present; that section only declares that a Court should not try a suit in which the matter in issue was also directly and substantially in issue in a previously instituted suit. Here the issues are different. In the first suit the only issue as to damages was with reference to the crop raised in the year 1284 standing on one of the plots; while in this suit the issue as to damages is whether the defendants have carried away wrongfully the crop of 1284 of the other plot and also whether they have carried away the crop of the whole 10 bighas of 1285. No doubt the question of title is the same, but that is no reason why the question of further damages should not be tried in a subsequent suit, and as regards the land itself there is the further question, *viz.*, whether the defendants actually dispossessed the plaintiffs after the institution of the former suit. Section 12 has, therefore, no application in the present case.

The decrees of the Courts below must, therefore, be reversed and the case remanded to the Court of first instance for a re-trial.

We think that the defendants must pay the costs of the plaintiffs in the Lower Appellate Court and in this Court. The costs in the first Court and further costs will abide the results.

[CIVIL APPELLATE JURISDICTION.]

CHMUN LAL (PLAINTIFF),..... APPELLANT; 1880. *Dec. 14th.*

AND

M LAL (DEFENDANT) ..... RESPONDENT. No. 7726 of 1880.

artnership, Suit for dissolution of—Jurisdiction—District Court—Contract Act, IX of 1872, *section* 265.

Section 265 of the Indian Contract Act is merely an enabling section, and does not prevent a plaintiff from suing to wind up a partnership business in any Court, other than a District Court, which has jurisdiction, having regard to the pecuniary value of the suit.

Javali Ramasami vs. *Sathambakam*, I. L. R., 1 Mad., 341 relied on.

APPEAL against a decree of the Officiating District Judge of Patna, dated the 5th of June 1879, affirming the decree of the 2nd Sudder Moonsiff of that district, dated the 30th December 1878.

The decree of the Moonsiff was passed in two cross-suits between the plaintiff and defendant, for an adjustment of partnership accounts. He dismissed the suits. On appeal the District Judge held that the Moonsiff had no jurisdiction to entertain the suits, the jurisdiction in suits of such nature being, in his opinion, vested in the District Court by sec. 265 of the Contract.

Section 265 enacts as follows :—

"In the absence of any contract to the contrary, after the termination of a partnership, each partner or his representatives may apply to the Court to wind up the business of the firm, to provide for the payment of its debts and to distribute the surplus according to the shares of the partners respectively.

Explanation :—The Court in this section means a Court not inferior to the Court of a District Judge within the local limits of whose jurisdiction the place or firm, or place of business of the firm is situated."

An appeal was preferred by both parties to the suits.

Baboo [illegible] Banerjee, and Baboo *Uma Kali Mookerjee*, for the Appellant.

Baboo [illegible] and Baboo *Prannath Pundit*, for the Respondent and cross-Appellant.

The judgment of the High Court was as follows:—

These are two cross-suits between persons who, at one time, were carrying on a partnership business in grains. The object of the suits was for adjustment of account and for recovery of the money due to each other. The suits were instituted in the Court of the Moonsiff of Patna. The Moonsiff dismissed both these suits. There were two appeals, and the District Judge on appeal held that the Moonsiff had no jurisdiction to entertain the suits; because under section 23 of the Contract Act, it was the District Judge's Court which had sole jurisdiction to grant relief in a case like this. We think that the District Judge is wrong in this view. It has been decided by the Madras High Court in the case of *Jaganadha Aiyan* vs. *Sankara Sivan*, I. L. R., 1 Mad., 341, that section 23 is only an enabling section, that is to say, it leaves to the option of the plaintiff either to institute proceedings under that section in the District Judge's Court, or to pursue his ordinary Civil remedy by instituting a regular suit in the Court which has jurisdiction, having regard to the pecuniary value of the suit. We entirely concur in this view of the section, and think that it does not oust the Civil Court from its jurisdiction.

We therefore set aside the decision of the Lower Appellate Court, and remand the two cases to that Court for re-trial. Costs to abide the result.

Mitter and Macpherson, JJ.

[APPELLATE CIVIL JURISDICTION.]

1881.
Feb. 9th.

No. 302 of 1879.

ANAILAL KHAN AND ANOTHER (DEFENDANTS),... APPELLANTS;

AND

SHOSHI BHOOSHUN BISWAS (PLAINTIFFS), ... RESPONDENTS.

Res Judicata—Civil Procedure Code Act, X of 1877 Sec. 13 and Sec. 244 (c)—Parties in representative character—Admission.

A suit having been brought against the widow and heiress of a deceased Hindu upon a mortgage executed by her, in respect of certain property left by her late husband, the defendant died and upon her death the sisters of the husband were, on the application of the plaintiff, substituted as parties on the record.

The substituted defendants denied that they were heirs of the widow, and claiming the property as heirs of the husband objected that the property was not chargeable with the widow's debt, in as much as it was a personal debt incurred without legal necessity.

The Court having refused to adjudicate on the question raised by them, and having made a decree, the same objections were raised in the proceedings in execution, but not decided, and the right, title and interest of the mortgagee was sold in execution of the decree.

In a suit by the heirs of the husband to have it declared that they were entitled to have the property freed from the mortgage executed by the widow, it was objected that the matter was *res judicata*, in as much as the question as to the right of the plaintiffs to claim the property as heirs of the husband ought to have been decided in the former suit, or under cl. (c) sec. 244 of the Civil Procedure Code in the execution proceedings.

Held, that as substituted defendants in the former suit the present plaintiffs were not parties for all purposes in that suit within the meaning of the Civil Procedure Code, and it was not necessary to decide the questions raised by them in the execution proceedings or in the former suit.

Held, also, on the facts, that the widow had no power to bind her husband's estate, and therefore nothing passed to the purchaser of the right, title and interest at the execution sale.

Where parties allow a suit to be conducted in the lower Courts, as if a particular fact were admitted they cannot afterwards in appeal question that fact and recede from the tacit admission.

1881.

KANAILAL KHAN v. SHOSHI BHOOSHUN BISWAS.

Judgment.

APPEAL from a decision passed by the First Subordinate Judge of the 24 Pergunnahs, dated the 21st July 1879.

Baboo *Rash Beharry Ghose* and Baboo *Saroda Churn Mitter*, for the Appellants.

Baboo *Sreenath Dass*, and Baboo *Kali Prosunno Dutt*, for the Respondents.

The facts sufficiently appear from the judgment of the High Court (1) which was as follows :—

The facts of this case are briefly as follows: one Ram Moni Dassi, the widow of Digumber Mundul borrowed Rs. 2,000 from the defendants in the present case upon the mortgage of certain property. This money was not paid and the mortgagees brought a suit against Ram Moni Dassi on the 17th May 1872 to enforce the mortgage lien against the mortgaged property. While that suit was pending Ram Moni Dassi died, and on the 10th July 1873, the mortgagee applied by petition to have the plaintiffs in the present suit substituted as defendants in the place of Ram Moni Dassi. In that petition the mortgagees stated that the present plaintiffs Shoshi Bhushun Biswas and others were the heirs of Ram Moni Dassi. These persons were at that time minors and Bhoopal Chunder Biswas was their father and guardian. Notice was served upon Bhoopal Chunder Biswas and he, Bhoopal, came in and filed on behalf of the minors a petition to be found at pp. 22 and 23 of the Paper Book. In that petition it is distinctly asserted that the minors were not the heirs of Ram Moni Dassi; and that they were sons of Ram Moni Dassi's husband Digumber Mundul and as such were the true heirs of Digumber Mundul and were in no respect heirs to the widow Ram Moni Dassi or of her streedhun. It is further alleged in that petition that the debt incurred by Ram Moni Dassi was a personal debt incurred for her own benefit, and that it was not incurred for any legal necessity which would have the effect of making such debt chargeable upon her husband's estate.

The Subordinate Judge before whom the case was pending recorded the following order: "The heirs of the husband of Ram Moni Dassi have raised a new plea in the case, *viz.*, that the

(1) McDONELL and FIELD, *JJ.*

rty secured in the bond could not be made liable for her personal ebts. This plea is foreign to this suit. This could not have been ised by the deceased defendant, and they, coming in as her representatives, cannot be allowed to raise it. The property was described in the bond as belonging to the debtor herself, and not to her husband, and the question as to whether that statement is correct or not cannot be legitimately tried in this suit. I leave these heirs to settle that question by a different suit if they are really in earnest." Now there is undoubtedly an error in the part of his order which says that the present plaintiffs came in as the representatives of Ram Moni Dassi. They did *not* "come in," if by that was meant coming in of their own accord. They were *brought in* by the mortgagee, and so far from coming in as heirs and representatives of Ram Moni Dassi, they, through their guardian, contended that they were not the heirs of Ram Moni Dassi but the rightful heirs of Digumbur Mundul. Before making these minors parties to the suit in the character of heirs of Ram Moni Dassi, it would have been proper for the Subordinate Judge to raise an issue and come to a judicial finding as to whether they were or were not the right heirs of Ram Moni Dassi.

We think it clear that no such issue was raised and that no such question was substantially decided between the parties. In the decree to be found at p. 40 of the Paper Book, the minors are not mentioned as heirs of Ram Moni Dassi, and the decree was passed against the mortgaged property with the further direction that any balance not realized therefrom, should be realized from the other properties of the deceased judgment-debtor, Ram Moni Dassi. There was no direction that such unrealized balance should be recovered from any assets belonging to the estate of Ram Moni Dassi in the hands of and undisposed of by the minors who are the present plaintiffs. Then it is clear that the words which we have above quoted. "I leave these heirs to settle that question by a different suit if they are really in earnest," distinctly excluded from the adjudication in that suit, the question whether the minors should be made liable as the right heirs of Digumbur Mundul.

It was first contended before us by the learned Pleader for the appellant that the present suit is barred by *res judicata*. We think it impossible to say that a question not only not decided in

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Judgment.

the previous suit, but in express language excluded fr decision therein, can be treated as a *res judicata* so as to est plaintiffs in the present case. After the decree had been pa the suit brought by the mortgagees, execution was taken o the property which was the subject of the mortgage bor attached in execution. The present plaintiffs appeared bef Subordinate Judge and raised an objection to the attachment property. The objection thus raised again in the executi ceedings was substantially the same question which they had to have decided in the proceedings before decree and wh Subordinate Judge had in express language refused to adj It is not to be wondered at, therefore that the then Subo Judge refused to deal with this question in the execution His order refusing to deal with it was appealed; and the o the Appellate Court was that the property should be sold, the same time that notice should be given that it was clain the reversioners (that is the plaintiffs in the present case) own property.

The pleader for the appellant has addressed a long ar to us contending that the question which the plaintiffs now have decided was a question which ought to have been between them and the present defendants in the execution ings, that it was in fact a question falling within clause section 244 of the present Code of Civil Procedure, that is, tion between the parties to the suit in which the decree wa or their representatives and relating to the *execution, disc satisfaction* of the decree. He has relied in support of t tention upon the case of *Chowdhry Wahed Ali* v. *Mussamma* decided by their Lordships of the Judicial Committee on June 1872, 18 W. R., 185; (S. C.) 11, B. L. R. F. B., the subsequent case of *Meer Mahomed Mozaffer Hossein* v. *Ameeroonnissa Khatoon*, 20 W. R., 280. We think that the present case is one to be decided upon its own m that its special circumstances take it out of the general r may be supposed to have been established by the cases ju In the Privy Council case their Lordships say that th concur in the *general proposition*, that a party sued in tative character is not a party to the suit within the

: Act XXIII of 1861. They then refer to the 203rd f the old Code of Civil Procedure, and they proceed to say:)vious, therefore, that a party in a representative character inctly a party to the suit that under certain conditions his ate property may be attached and sold. It is true that to vith this liability, it must be shown that he has received of the deceased of which he has failed to prove a proper n. But these things are all cognizable and proper to be d in the suit in which the decree is made, during the pro- he execution proceedings founded upon such decree. It seem to their Lordships to follow that, because all the s relating to execution cannot be applied to a defendant representative character, such a defendant cannot be re- a party to the suit within the meaning of such of them e applicable to his case."

ıtirely agree with what was said in the case of 20 W. R., the above remarks of their Lordships of the Judicial e are not to be treated as an *obiter dictum* merely, but amount to an authoritative decision which this Court follow. But it appears to us that these remarks do not ıgth of establishing the proposition contended for before hat a party sued in a representative character is a party ıe meaning of sec. 11 of Act XXIII of 1861 (sec. he present Code) for all purposes and irrespective of e of the representative character in which such person is a The High Court had laid down a general proposition (see al Judgment of the High Court in 2 B. L. R. F. B., 84— the remarks of the Privy Council above partly quoted at R., 155. The Privy Council intimated that they could not that general proposition; in fact that the proposition was put to be generally true, and they pointed out an instance the proposition so generally put could not be maintained. ıot, however, go the length of saying that the converse of al proposition is true, and that a person who is a party to ny character is a party in every other character, which he nd this irrespective of the question whether there are in provisions as to execution which apply to this case. We another test. The questions mentioned in cl. (*c*) of

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sec. 240 are questions arising between the parties to the suit in which the decree was passed and relating to the execution discharge or satisfaction of the decree. Now, when a decree obtained against a particular person is sought to be executed against the heirs or representatives of that person who have received a portion of his property and are liable to the extent of the undisposed assets in their hands, there can be no doubt that the decree is still the same decree; and this is in no way altered by the alternation in the person against whom it is sought to be executed. But in the present case it may be said that the decree passed against Ram Moni Dassi and the property of Ram Moni Dassi and the heirs of Ram Moni Dassi is different from a decree passed against the property of Digumber Mundul and the eight heirs of Digumber Mundul. We do not, however, desire to base our decision upon this ground merely.

It appears to us that what was directed to be sold was the right, title and interest of Ram Moni Dassi; and looking at the order of the District Judge dated 24th December 1879 (p. 37 Paper Book) and the sale notification (pp. 38 and 39) we think clear that whatever interest the present plaintiff might have in the property as reversioners, *i. e.*, as the right heirs of Digumber Mundul, was expressly excluded from the sale. The first paragraph of the conditions of sale runs thus: "Beyond what right, title and interest the judgment-debtor has in the said properties the right of any other party or the properties connected therewith shall not be sold." Now, if we turn to the decree at p. 41 we find a direction that the balance be realized from the properties of the deceased judgment-debtor, Ram Moni Dassi. It is therefore clear that Ram Moni Dassi and Ram Moni Dassi alone was treated as the judgment-debtor, and that what was sold was the interest of Ram Moni Dassi and that the interest of the reversioners the right heirs of Digumber Mundul were distinctly and expressly excluded from the sale.

It may be as argued before us that the prayer for a perpetual injunction, which the plaintiffs have inserted in their plaint, should be granted in this form, but we think that this is not very material. What the plaintiffs substantially ask is, to have it declared that the interest of Ram Moni Dassi in this property is nothing. Now once that is found and declared, there will be no occasion for a perpetual injunction restraining the defendants from selling which is worth nothing.

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We have then to consider whether there is enough on the record to enable us to say that the interest of Ram Moni Dassi in the attached property amounts to nothing. We think that this question falls within a principle acted upon in many cases, namely, that where parties allow a suit to be conducted in the Lower Courts as if a certain fact was admitted they cannot afterwards in appeal question this fact and recede from their tacit admission. No question was raised in the written statement before the Subordinate Judge as to Ram Moni Dassi having any other interest in the property than the life-interest which she had as heir of her husband Digumber Mundul. No express issue on this question was raised by the Subordinate Judge; nor was he asked to raise such an issue; and the point has not been taken in the grounds of appeal to this Court.

Then in the mortgage deed to be found at page 10 of the Paper Book it is stated that the property was let in ijara to Radha Mohun Mundul for a term of eight years; and we find at page 11 the ijara pottah executed by Ram Moni Dassi in favor of this Radha Mohun Mundul in which it is stated that the right of Ram Moni Dassi in the property was derived from the fact of her being the heiress of Digumber Mundul.

We do not say that the recitals in these two instruments would be sufficient evidence upon which to decide this question, if it really fell to be decided upon evidence; we merely advert to these recitals taken in connection with the conduct of the defendants in the Court below as sufficient to satisfy our minds that no question as to Ram Moni Dassi having any other interest in the property than that of a Hindu widow was ever seriously raised or disputed between the parties in the Lower Court.

For these reasons, it appears to us that the decree of the Lower Court must be affirmed, and this appeal dismissed with costs.

With respect to the form of the decree we think it more appropriate to draw it up as a decree declaring that the mortgage debt was incurred by Ram Moni Dassi personally, that it is not binding upon any property of her husband Digumber Mundul in which she enjoyed a life estate; and that Ram Moni Dassi had no interest beyond this life estate in the property which forms the subject of this suit and which the mortgagee has endeavoured to bring to sale after her death in execution of his decree.

...RISDICTION.]

.... APPELLANT.

...*capable of giving*

... Evidence Act, in order
... unable to attend by
... witness should be
... her precise evidence
... of the illness and

... to give evidence
... in our opinion is

... the United.

... by the Sessions

... purposes of this

...

... the conviction
... of Issue. Pat-
... Parson, who is
... and whose depo-
... of the Do-
... as we think
...
... him and he
... remember. Also
... evidence is to what he
... has been read to us we also
... Before

... Parsons and Paton JJ.

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gistrate of one of the complainants (Darsun) was admitted ons Judge under Section 33 of the Evidence Act, it being ertain of the witnesses that he was ill and confined to

We are of opinion that the evidence as to his illness fficient to bring the case within Section 33 of the Evidence Sessions Judge ought to have required more precise evi- to the nature of the illness and the incapacity of the o attend. A case has been cited to us from 4 Cal. 4, *In the matter of Pyari Lall*, in which it was held that acity to give evidence mentioned in Section 33 must be a nt incapacity.

our opinion that is not a necessary construction. We are to think on the construction of the entire Section and from e also to Section 32 which precedes it that something short nanent incapacity might satisfy the words of the Section, able of giving evidence." It is not, however, necessary to that question in this case, or we might have to send the case a Full Bench. It is sufficient in this case, without reading osition of Darsun, to support the conviction.

here was a preliminary objection which was taken, *viz.*, that mmitting Magistrate had made a kind of preliminary inquiry ich he examined certain persons some of whom were after- called as witnesses; that the appellant before us applied for positions given by these persons and that though they were mined, in answer to his application, no depositions were forth- g. This Court called for an explanation on this point. The y Magistrate explains that this preliminary inquiry was con- in the presence of the accused; that the inquiry he made of particular persons was for the purpose of finding out whether was any and what case; and that he did not take down their ents in writing, though he did examine them after swearing

We think it was inofficious and improper to swear these ses on an occasion and for the purpose as stated; but having them, we are of opinion that under the circumstances he was ound to take down their statements in writing as the Deputy trate was only the committing officer, and as he did not try se we think that the accused has no cause of complaint in this t.

...APPELLANT

RESPONDENT

—*Possession,*

...Subsequent Judge

...plaintiffs to recover ... the date of the ... the plaintiffs' title ... possession of the ... defendants ... various times adjoining ... adjoining lots were at the ... that such alterations have subsequently taken place, that from time to time re-formations took place among

ave been made by the parties interested to show that portions of he re-formations were on the site of their own churs; and that in 875 disputes having arisen about some re-formed land, the Deputy Magistrate attached certain lands, the extent of which is disputed, aving the parties interested to sue in a Civil Court. The plaintiffs herefore brought the suit, joining as parties all the parties to the ttachment proceedings.

The land claimed in the suit consists of two plots, marked in he Amin's map A and B. As to plot A the plaintiffs have obtained decree and that decree is not appealed against. As to plot B two rincipal groups of defendants resisted the plaintiffs' claim. Defendants Nos. 4, 17 and 18 as interested in a chur known as Adma Munirabad claimed so much of plot B as lies to the south of a Done ndicated in the Amin's map as No. 1 in the map of Amin, Wooma Churn.

Defendants Nos. 1 and 2 claimed so much of plot B as lies to he north of that Done as belonging to the chur Baboo Chur. The main defences were the same in both cases.

I. It was denied that the lands in question were re-formation on the site of Rajapur.

II. It was alleged that in the year 1869 the present plaintiffs had in summary proceedings under section 318 of the former Criminal Procedure Code claimed these same lands and their claim had been disallowed. And it was said that as they had not brought a suit within three years, their right was barred.

III. Each of these groups of defendants set up a title by adverse possession for more than twelve years under the ordinary law of limitation.

The Lower Court held in favor of the plaintiffs upon each of the first two questions, but upon the third question held in each case in favor of the defendants; and accordingly dismissed the suit so far as it related to plot B.

The appellants dispute the finding of the Lower Court upon the third question. The respondents support that finding. They also seek to support the decree of the Court below on the ground that its findings upon the first and second questions were wrong.

From the decree of the lower appellate Court the plaintiffs appealed to the High Court.

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Evans, and Baboo *Sreenath Dass*, Baboo *Doorga Moh* and Baboo *Boidonath Dutt*, for the Appellant.

Branson, and Baboo *Kali Mohun Dass*, Baboo *Hem C Banerjee*, Baboo *Mohini Mohun Roy*, Baboo *Boikontanat* Baboo *Bassant Coomar Bose* and Baboo *Kashee Kant Sen*, Respondents.

The following judgments were delivered by the High Cour

WILSON, *J.* (after stating the facts as above):—The mai tions for our decision are whether the findings of the Lowe are correct. Some other minor points have been raised which notice subsequently.

Upon the first question whether the lands in dispute re-formation on the site of Rajapur I agree with the Court The survey map of 1859-60 shows at once that the plaintiffs of the position of Rajapur is approximately correct. An report and map of the Amin place the matter beyond doubt, i can be trusted. But it is said that they are not to be trust agree that the reports and maps of Amin in such cases sho examined with caution. In the present case the work of the bears mark of care and intelligence. He had with him the maps of the several Thaks in question. He began his work rightly on the undiluviated lands of Shib Sen on the ea north-east of Rajapur, where there were permanent marks ascertainable. Having thus obtained trustworthy starting he says: "I have accordingly duly ascertained the distance be the land and the chur from the aforesaid stations and l successively ascertained the original site of mouzahs mention the parties according to the measurement and bearing of the from that place, I have correctly put down the same in the place in the map made by me and demarcated the different m with different colors." His map is before us and he has g his field book. It is said that his field book is defective giving with sufficient clearness all the details of his measu It may be that some points in that field book might be the for further explanation. If so, that would have been a good for applying in the Court below to have the Amin cal examined. It is no reason why we should upset the findin Court below, in the absence of any circumstances throwi

(1) WILSON and FIELD, *JJ.*

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upon the correctness of the Amin's method or the accuracy of his results.

The next question is whether the suit is barred by reason of its not having been brought within three years of the order of the Magistrate in 1869. As to this I agree with the Court below that the identity of the land then in dispute with that now in dispute has not been established. All that appears is that among the attempts made by various persons to identify parts of the land gradually re-forming, one was made by persons acting for the present plaintiffs to identify some land as Rajapur. The attempt failed and the claim was dismissed. There is no reason to think that the land then claimed was or could be the same as that now in dispute.

The next question is, with regard to each portion of plot B, whether this suit is barred by reason of twelve years' adverse possession. As to this the plaintiffs' case is that the diluviation of their lands began about 1860 and was completed about 1865; that the re-formation began in 1871 and was completed about 1875. The defendants throw back both events to much earlier dates and say that they have been in actual occupation of the lands in dispute for far over twelve years.

We have first to enquire upon which side the burden of proof lies. The Subordinate Judge cast the burden upon the plaintiffs, and held that it lay upon them to show either that the lands were re-formed within twelve years or that they had been in actual possession within that period. In this I think the Subordinate Judge was in error.

As it has been contended that the authorities upon this subject are in conflict, it is necessary to consider, the matter both from the point of view of principle and from that of authority.

Certain propositions of law upon the subject are undoubted.

It is not disputed that as a general rule where a plaintiff claims land from which he alleges he has been dispossessed the burden is upon him to show possession and dispossession within twelve years, *Dewar Singh* v. *Nund Lall Singh*, 8 Moore's I. A., 199, 220.

Proof of possession within 12 years does not necessarily mean proof of acts of ownership within that time. The nature of the proof of possession must depend on the nature of the case. In the case of a house actually occupied or land under cultivation or yield-

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ing a rent, proof of possession is easy. In many cases, as of incapable of cultivation, jungle or waste lands, uninclosed p various kinds, all the proof that can commonly be given is t possession taken or acts of owpership done at some time, possession will in law continue until the possessor by his c shows that he means to relinquish his possession, or he is e by some one else. These considerations however affect the n proof, not the burden of proof. The general rule still is th plaintiff must prove that he has been dispossessed within years. See *Pandurang Govind* v. *Balkrishna Hari,* 6 H. C. R., 125.

But there are many cases in which the party on wh burden of proof in the first instance lies may shift the bu the other side by proving facts giving rise to a presumption favor. We have to consider whether the present plaintif succeeded in doing so, and for that purpose it is necessary to e the decisions as to the burden of proof in the case of lands gr diluviated and gradually re-formed.

As to such cases a second proposition is, I think, beyon tion, that, when the diluviation has been more than twelv before suit, the claimant, unless he can show possession si re-formation, must at least show that he was in possession d the date of the diluviation.

A third proposition is now I think, beyond dispute tha the true owner is in possession at the time of diluviati possession is presumed to continue as long as the land contin merged, probably also afterwards until he is dispossessed.

This proposition however would not be sufficient to a burden of proof. It would leave it upon the plaintiff, bu enable him to prove his case either by showing the dispos have been in fact within twelve years; or that the sub has continued down to within twelve years; so that his p cannot have been interfered with more than twelve years a

But then arises the question, whether we ought not to something further in favor of the plaintiff; whether wh proved his possession down to the period of diluviation, shown the diluviation to have occurred at such a date such circumstances as in this case, we ought not to p

submergence, and with it the plaintiffs' possession, to have continued until the contrary is shown. If this presumption can properly be made, the burden is shifted to the defendant of showing adverse possession for twelve years.

Upon principle I think such a presumption may properly be made. The well known presumption in favor of the continuance of a physical condition, in the ordinary course of things likely to continue, until the contrary is shewn is embodied in section 114 of the Evidence Act, which section is followed by illustrations and explanations. In the present case it appears that the total area diluviated was very large, and the process of diluviation and re-formation gradual—that at the date of the Thak map of 1859 the river had not touched Rajapur; and from the survey map of 1859-60 that at that date it had effected a portion of that estate. The evidence shows beyond doubt that the process of diluviation went on afterwards. Under these circumstances it seems to me, on principle, reasonable to presume that the lands in question continued submerged in March 1865 (which is the material date) until the contrary is shewn.

The weight of authority seems to me in favor of the same view.

In the case of *Mohunt Chattorbhooj Bharti* v. *The Government of India*, Reg. App. No. 185 of 1877, (not reported,) the plaintiffs proved that they were in possession of the lands in question in 1846 and that the lands were soon after that time diluviated. The suit was brought in 1869 and the Court (GARTH, *C. J.* and TOTTENHAM, *J.*) held that the burden lay upon the defendants of proving that the suit was barred by limitation.

In another case, Reg. App. No. 2800 of 1877, it appeared that the plaintiffs were in possession of the land in dispute up to the diluviation, which took place some time after 1858. The suit was brought in 1876. PONTIFEX and MCDONELL, *JJ.*, held that the burden lay on the defendant to show that the claim was barred.

In *Radha Govind Roy* v. *Inglis*, 7 C. L. R., 364, the suit was in respect of soil which had been part of the bed of a lake, but which by the gradual drying of the lake had become culturable land. The defendants relied, amongst other defences, upon limitation. The Privy Council having held first that the property in the

soil and not a mere right of fishing was in the plaintiff, went o
held further that it lay upon the defendant to show an adverse
by limitation. It does not appear to me that the Privy Co
intended in this case to reverse its earlier ruling in the ca
which I have already referred. But that Court does appear t
to have laid down a rule applicable to cases analogous to the
before it, which we are bound to follow in the present ca
it is properly within the analogy. And I am unable t
any reasonable distinction between the case of land forme
the gradual drying up of a lake, and that of land diluv
and then re-formed by the gradual action of a river. The
rule was followed in a very recent case, before GARTH, C
and WHITE and MACLEAN, *JJ.*—*Kalu Churn Sahu* v. *Secreta*
State, 8 C. L. R., 90.

Two cases have been referred to as authorities to a con
effect. In *Kunwar Ranjit Singh* v. *Schoene, Kilburn & Co.*, 4
L. R., 399, the plaintiffs claimed 700 bighas of land, a re-form
on their site. They alleged diluviation between 1263 and 127(
formation between 1270 and 1273; that they had been in a
possession in 1273 and been dispossessed in 1274. The suit
brought in 1876, corresponding to 1283. The Court (JACKSO
MCDONELL, *JJ.*) held that the burden of proof was governed b
ordinary rule as laid down in the case referred to in 8 Moore's
and looking at the case as put forward by the plaintiff hims
case of actual possession and dispossession of cultivable land
their re-formation, this ruling does not seem to me inconsi
with the others to which I have referred. In this case furth
was found that the plaintiff had not been in possession sin
formation, and that the bulk of the land had been re-form
more than 12 years. But a point was raised as to some 200 b
(the exact amount and its situation not being ascertained)
the Court below was inclined to think might probably have
re-formed within 12 years. The learned Judges in this Court
that it lay upon the plaintiffs to show which, if any, of the
in dispute had so re-formed within 12 years. I am not s
that there is necessarily any inconsistency with the authori
have considered, in holding that where the plaintiffs made
claim upon one ground and having failed in establishing tha

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to these maps and was unintelligible without them, we felt that we could not dispose of the case on the materials before us. We accordingly intimated that we should have to remand the case. Thereupon Mr. Evans on behalf of the appellants, rather than have the case remanded, consented that the maps should be treated as evidence for what they are worth. On examination they seem to me worth nothing, or less than nothing to the defendants' case. It appears from the evidence that the case in which the map of 1866 was prepared was one in which some re-formed lands were claimed as a re-formation on the site of Joyka. Joyka being the property on the west of Rajapur, and the map is framed on that theory. It makes the land then in dispute Joyka and puts the surrounding properties in corresponding positions. And if that land were Joyka and the map were correct, it would show that parts of Rajapur had at that time re-formed. But we know nothing of the grounds on which the land was alleged to be Joyka. The map itself affords no assistance. There is not a single trustworthy point on the main land shown upon it. The Mut of Rajabari, an important landmark in all the genuine maps is wanting. A point is shown on the main land to the east as the junction of Borokati and Kistopur. But there is nothing to show that this point is marked by any object which can be recognized, nothing to show that it is more than a point arbitrarily chosen and called the boundary. There is indeed a tree marked on the south bank as the Thukorani tree. But the map itself shows that the identity of the tree was disputed. And the defendants' evidence shows that the Court rejected the theory on which the map was framed, and dismissed the suit. This map therefore certainly does not help the defendants.

The map of 1870 was framed for the purposes of another suit. And according to the defendants' witnesses that suit and map referred to land adjoining that shown in the first map. If that be so, and if the land in the first map was not Joyka, that in the second was certainly not Rajapur. Moreover, it is not called Rajapur on the map. Now is there anything on the map which could entitle us to say that it is so. And it is clear both from the statements on the map and from the evidence of witnesses that nobody at the time thought the map applied to Rajapur or any place near it.

There remains only the oral evidence of the defendants'

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[illegible] J.

1870-7[illegible] it was partially diluviated, the diluviation being comp[illegible] subsequently. But according to the Adma Munirabad witn[illegible] the re-formation was completed in 1860, 1861 or 1862.

We know that in 1866 an attempt was made to show lands which had then re-formed were part of Joyka, in which if Komal Narain's map be correct, part or the whole of plot Rajapur would also have been re-formed. And the identificatio[illegible] found to be incorrect. But according to the defendants' witn[illegible] plot B was by that date under cultivation by resident tenants.

In 187[illegible] litigation was again in progress, everybody's a[illegible]tion was alive to the importance of identifying the newly fo[illegible] land. The Amin was at work and a map prepared. And at time the defendants' representatives, now their witnesses, ca[illegible] the conclusion that no part of Rajapur had re-formed.

And again in 1870 and 1872 Mr. Mon Mohun Ghose the plaintiff, went to look for his lands and could not find them.

These circumstances are sufficient to satisfy me that the p[illegible] tiffs' witnesses are speaking the truth when they say that pl[illegible] is a new formation and that the defendants' story is untrue.

One point which was much discussed in the argument call[illegible] notice, namely, whether plot B was, or was not included i[illegible] Magistrate's attachment. The plaint describes the lands sue[illegible] as lands included in the attachment. It was said, on behalf of[illegible] defendant that plot B was not so included, and that being so, the plaintiff ought to have a separate suit against the Babur [illegible] defendant for the upper portion of B and a separate suit ag[illegible] the Adma Munirabad defendants for the lower part, inste[illegible] joining all his claims in this suit. If it were necessary to d[illegible] the point, I should say that the plaintiffs have failed to prove[illegible] B to have been part of the attached lands. It would probab[illegible] impossible from existing materials to ascertain the limits [illegible] attachment. But the question has not, I think, any material[illegible] ing upon the case. When the suit was brought some, at l[illegible] the plaintiffs' land was under attachment. How much m[illegible] could tell with confidence. Under such circumstances it [illegible] think, a proper course to claim all in one suit, and make [illegible] parties to the attachment proceedings parties to the suit.

The decree of the Subordinate Judge will therefore be r[illegible]

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included within the red boundary on that map and com
plots A and B is land re-formed on the original site of R
door Chur. He has given the plaintiffs a decree for plot A
to plot B he has held that the plaintiffs are barred by l
and in respect of this plot he has dismissed their case. He
his judgment at page 184 of the printed paper book:
"however, of opinion that the plaintiffs' claim to plot B
"by the general limitation of 12 years. It is true that
"to the finding arrived at by the Amin after careful inve
"the said plot is a part of the re-formed land of mouzah
"of which their father had possession until it was completel
"away by the river Padma; still when the defendants p
"the re-formation took place more than 12 years ago, and
"(the defendants) have since been in possession thereof, it
"bent on the plaintiffs to prove, for the purpose of remo
"plea of general limitation, that the said plot thrown u
"river within 12 years preceding the date of the suit, or
"held its possession at any time within that period.
"plaintiffs have not been able to show or even to allege tha
"disputed chur had formed, it was ever held in their posse
"their endeavour to prove that the re-formation took pla
"12 years preceding the date of the suit, has failed in r
"the plot B."

Now the first question has been raised before us and is necessary for us to decide is whether the Subordinat right in thus unreservedly placing the burden of proof plaintiffs. In the case of *Radhaprosad Singh* v. *Ra Singh*, 1 C. L. R., 259, decided by the Privy Counci 29th November 1877, it was held that the principle o case is not applicable to land in which, by long possessio wise, another party has acquired an indefeasible title. The case is that the land was wholly submerged in 1865 and l re-formation began in 1871, and that the whole of the l forms the subject of this suit was completely re-formed i If this contention be correct, it is evident that at the poi twelve years before the institution of this suit, the land i was wholly submerged and was not, therefore capable visible possession. The chief defendants contend that th

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"pelling them to prove the time and manner of dispos
In a case to be found at 19 W. R., 193,—COUCH, *C. J.* said:
"plaintiff must show that he or some one through whom h
"has had possession within twelve years before the suit.
"sues for the recovery of immovable property on the gr
"having been dispossessed from it, he must show that he h
"within twelve years from the time when his cause of actic
"the time when he was dispossessed. It is not enough fo
"prove his title to the property which is the subject of t
"and leave it to the defendant to show that the suit is b
"the law of limitation by proving when the plaintiff wa
"possession." The general rule enunciated in these cases
so far as I am aware, been doubted or shaken by the auth
more recent decisions. But an exception appears to ha
grasped upon this general rule by certain decisions which I
about to notice. In the case of *Radha Govind Roy Saheb* v
7 C. L. R., 364, decided by the Privy Council on the 6th Ju
the plaintiff claimed certain lands included within the li
Beel or lake. The land so claimed had become dry and c
during, at least, a part of the year. The plaintiff was h
entitled not merely to the right of fishery in the *Beel* bu
the soil of the *Beel*. The proprietor of a neighbouring Ta
the defendant, and he denied the plaintiff's title to the so
Beel, and relied on adverse possession for more than twe
before the institution of the suit. Their Lordships of t
Council said:—"The question remains whether the dispu
"had or had not been occupied by the defendant for twe
"before the suit was instituted, so as to give him a titl
"the plaintiff by the operation of the Statute of Limitat
"this question undoubtedly the issue is on the defenda
"plaintiff has proved his title; the defendant must prove
"plaintiff has lost it by reason of his, the defendant's, adv
"session. The High Court came to the conclusion that t
"dant had not satisfied the burden of proof thrown upon
"their Lordships are not prepared to reverse that ju
Here there is nothing to show that the plaintiffs had at
been in possession of the dried up soil of the *Beel* and
the soil remained submerged, it may well be, that the

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"dant (in his written statement) and his witnesses attempt
"back the re-formation to an earlier date; and they have a
"in support of their case certain Kobooleuts, which they sa
"given by tenants for the cultivation of indigo. But we
"opinion that the evidence of the defendant is not so preci
"we can say that those Kobooleuts apply to the whole or an
"ticular part of the re-formed lands; they may very well
"included only land within plot D, and we think in a case li
"present, where the land has formed gradually on the pla
"site after an equally gradual diluviation, the whole proc
"diluvion and alluvion, occurring some time after 1858 (th
"when possession was taken under the decree in the former
"and before 1876 (when the plaint in this suit was filed);
"rather on the defendant than on the plaintiffs, where the
"date of re-formation was in doubt, to show when actual pos
"of the various portions of these re-formed lands was taken
"the plaintiffs were actually in possession up to the diluvi
"and as upon re-formation it might be doubtful how soon th
"would be fit for the purposes of cultivation, which indeed
"depend on the nature of the crop, and, as even upon the defe
"evidence, it is doubtful whether the land had been fit for c
"tion more than twelve years before suit, we think that in th
"it did not lie on the plaintiffs to show they had been dispo
"within twelve years; and we cannot accept as satisfactor
"evidence adduced by the defendant as to his possession for
"years before suit."

I may also refer to the recent decision of the Court
case of *Kalee Churn Sahu* vs. *The Secy. of State, ante* 90.

It appears to me that the principle to be gathered fro
cases is that although, according to the general rule, it li
the plaintiff who is met with the plea of limitation to show
possession, within twelve years before the institution of
when the property in dispute is capable of actual and visib
sion, yet that from the nature of the thing an exception
made to this general rule in the case of property wh
susceptible of actual and visible possession. In respe
latter class of cases, it appears to be only reasonable to
when the title and possession have been proved to be

up to a certain point of time; when there has been no
r of the title to any third person; and there is no evidence
possession was exercised by a person other than the
having the title so long as actual visible possession was pos-
he possession of the person having the title will be presumed
tinue until the property has again become susceptible of
visible possession. Proof of possession is presumptive proof
nership because men generally own the property which they
. It may, with equal reason be said, that if the ownership of
ty is proved and there is nothing to show that the possession
property is with any person other than the owner, it may
be presumed to be with the owner. A presumption dispenses
r supplies the place of evidence. If the above be a reasonable
ption, it takes the place, in a case like the present, of evi-
to show the plaintiffs' possession within twelve years before
a property in which, from the nature of the thing, evidence
al possession is impossible.

here are a few cases which, at first sight, appear to conflict with
inciple which I have endeavoured to evolve from the above
In the case of *Coomar Runjit Singh* vs. *Schoene, Kilburn*,
. R., 390, the plaintiff alleged that the lands had re-formed
years before the institution of the suit and that he had
ed actual possession by sowing *khesari*. It is clear that the
iff here, by his own allegations, excluded a presumption which
only arise if the lands were not susceptible of cultivation and
sion. In the case of *Gokool Kristo Sen Moonshee* vs. *David*, 23
, 443, the land had been submerged and after its re-appearance
71, the plaintiff had never been in possession. This being so,
aintiff's suit failed because he did not prove *secundum allegata*
is vendor had been in possession before the land disappeared
diluviated. Apparently the Court thought that, if he had
ded in proving that he or his vendor was in possession before
luviation, his cause of action would have arisen when upon
e-appearance of the land, he was prevented by the defendant
resuming actual possession. This appears to be the real point
ision in this case and if this is so, there is nothing which con-
with the Privy Council decision or the other cases above quoted.
e case of *Mahomed Ibrahim* vs. *Morrison*, I. L. R., 5 Cal., 36,

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reference was made to a class of cases which supported the pro that when limitation is pleaded in respect of lands, which are e a jungly or unculturable state, it is for the defendant to estal plea by proving adverse possession for more than twelve year was held that that proposition could not be applied to land l under cultivation but that in this latter case the plaintiff, i to get over the plea of limitation, must at least establish tha the land in suit formed within twelve years, or was not in a of cultivation within that period. It is not very clear whet was a re-formation on old site, and no question appears arisen as to which party was entitled to the site before the fo of the chur.

It appears to me that none of these cases are in confli the principle which I have above adverted to as deducible f Privy Council case and the other cases bearing upon th point. If otherwise, the decisions which are in conflict w Privy Council case must be taken to have been overruled The conclusion to which I am then led is that the burden o has in this case been improperly laid upon the plaintiffs, and should have been laid upon the defendants, in other words, is for the defendants to show that, as alleged by them, th were re-formed twelve years before the institution of this s have since been in their possession.

I now proceed to consider how the defendants have dis this burden of proof and it will be convenient to consider sepa *first*, the case of the defendants 4, 17 and 18 who claim the of plot B south of Done No. 1 as part of chur Amda Mun *secondly*, the case of defendants 1 and 2 who claim the part B north of the said Done as part of their Babur Chur, latter defendants are in the same position as defendants 12 *thirdly*, the case of defendants 19 and 20 who own Shib whose case is to be considered as to costs merely; *fourthly*, of defendant No. 11 Sreemutty Kuroonamoyi Dabia as only; and *fifthly*, the case of defendant No. 16 Abdul Gufo as to costs only.

In considering the case of defendants 4, 17 and 18 it advisable first to deal with the two maps one called Komul map made in 1866 in case No. 108 of 1865; and the oth

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Churn Roy's map made on the 27th April 1870, in case of 1869. These maps were made in two civil cases to which ent plaintiffs were admittedly not parties. A good deal of on took place at the hearing of this appeal as to the relevancy maps: and the result of this discussion was that they have mitted for what they are worth, it being, however, under- at the judgments and proceedings in the cases in which aps were made are not admissible or admitted as evidence esent case. I do not propose to discuss at any great length ence or the arguments which have been addressed to us in of these maps. I think it sufficient to say that after the reful consideration which I have been able to give to the I am not satisfied that any land demarcated in these maps identified with any portion of the land which forms the of dispute in the present case. With respect to Komul s map it may be observed that it was sent to the Amin after rn to Dacca and that it was not compared by him on the h the locality. In his report he says that he had compared p in two other cases; but I apprehend that no opinion by the Amin upon what he had done in the other cases to he present plaintiffs were not parties, if at all admissible, any thing here. Neither of these two maps shows *kandis* s to have been in existence upon the land at the time when ps were made. If such *kandis* were in existence, they all probability, have been shown on the maps, more espe- certain bowers or cattle-sheds have been shown on the map Churn Roy. This leads to one of two inferences, either lands shown in these maps are not identical with any lands rm the subject of the present suit and upon which the s of the defendants say that there were *kandis* some 12 or ago; or that these witnesses are not speaking truth. ference is unfavorable to the defendants. Upon the rest idence which the defendants have produced to show that s comprised in plot B were formed as far back as 1261, usion at which I arrive is that the defendants have failed re-formation of these lands at any period so far back as before the institution of the suit. Without considering nce at length I may advert to the following points: First

Mr. Mon Mohun Ghose states that he saw in 1870 a flowin on the spot where the lands in plot B now exist. It may be possible that Mr. Ghose, forming his opinion from a mere ins of the locality and the Survey map and without making an measurement, was mistaken in the opinion so formed by him, this piece of evidence stood alone, it would not probably be very much. In the second place we have in the plaint filed b Mohun Roy and Bycant Mohun Roy on the 29th June 18 allegation that the whole of chur Munjur was submerged i (that is 1865) and began to re-form in 1278 (that is 1871). Munjur corresponds with plots marked H and I on the Amin' and, if these statements were correct, it is exceedingly imp that the adjoining land comprised in plot B could have b existence at the time alleged by the defendants. Thirdly, th map of 1859 and the Survey map of 1859-60 show that th comprised in plot B was then in existence. The diluviatio have been subsequent to those years; and the re-formatio years later. This contradicts the defendant's witnesses w that plot B was completely re-formed 17 or 18 years ago. these circumstances, I am of opinion that the defendants 4, 18 have failed to prove that the land comprised in plot re-formed more than 12 years before the institution of the su that they have acquired an indefeasible title thereto by twelv adverse possession.

It may be well to observe here that I concur with the dinate Judge in accepting the accuracy of the map prepared Civil Court Amin.

It was at one time contended before us that the Amin h correctly delineated the site of Rajapore upon the map. But carefully considered this argument, it appears to me that it not to succeed. No specific objection of this kind was made petition of the 6th November 1868 to be found at page 179 Paper Book. The Amin was not called or cross-examined having regard to the Field book at pages 174 and 176 of the Book, and to the statements made by the Amin in his report. no reason to doubt that the site of Rajapore was accurately neated upon the map in respect of its position with regard surrounding mouzahs. The result is, that the title to pl

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in the plaintiffs; and, the defendants not having by twelve adverse possession defeated that title, the plaintiffs are enti- a decree in respect of plot B as well as in respect of plot A. his deals more especially with so much of plot B as lies south Done No. 1 and with the case of defendants 4, 17 and 18. respect to the case of defendants 1 and 2 and so much of plot es north of the Done, there can be little doubt that the plain- e entitled to succeed upon the same evidence and the same rations which entitle them to a decree for the southern por- against defendants 4, 17 and 18.

his appeal will be decreed with costs as against defendants 1, 7 and 18.

With respect to defendants 19 and 20 who own Shib Sen ho are found to be entitled to plot D, I think that they are l to their costs and that the decree of the Subordinate Judge respect must not be interfered with.

efendants Nos. 4, 17 and 18 will be entitled to costs in re- f plots H and I, which belong to them as part of Munjhur, ch as it appears from the statements of the plaintiffs' pleader ound at pages 20 and 21 of the Paper Book, that even after nin's measurement the plaintiffs maintained their claim to I and I.

s to defendant No. 11 she contented herself with putting in on to be found at page 22 of the Paper Book and took no part in the proceedings. I think that she ought not to sts from the plaintiff.

s to defendant No. 16 who is the owner of Borokati to which and F are found to appertain, it appears to me that the ffs can scarcely be said to have been wrong in making him a o the present case, in as much as the attachment made by the Magistrate was indefinite and inexact as to boundaries, and sons who were parties to the proceedings under Section 530 Code of Criminal Procedure may therefore have been pro- nade parties to the present suit. Until a proper measure- nd demarcation of boundaries had been made, it was not to determine what portions of the attached lands belonged proprietor. But the plaintiffs were wrong in framing their o as to include lands that might be found and subsequently

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Judgment.

FIELD, *J.*

were found, to belong to proprietors other than themselves; and i not distinctly limiting their claim to such lands as might up accurate demarcation of boundaries be found to have been re-form upon the original site of their own chur. By adopting this cou in the first instance and persevering in it until a late stage of proceedings they compelled persons who might otherwise have b mere *pro forma* defendants to attend Court and watch over t own interests as active parties. I think, therefore, that the o of the Lower Court giving costs to defendant No. 16 ought no be disturbed.

[CIVIL APPELLATE JURISDICTION.]

UMBICA SUNDURI CHOWDHRAIN AND ANOTHER, (PLAINTIFFS) ..... APPELLA

AND

1881.

Feb. 25th.

AJITULLA MONDUL, (DEFENDANT) ..... RESPONI

No. 1315 of 1879.

Civil Court, order by, under Section 471 of the Criminal Proc Code—Appeal—Procedure.

Where a Civil Court directs an enquiry to be made by the M trate of the District under Section 471 of the Criminal Prosec in respect to the Evidence given by the witnesses in a case b it, the High Court cannot as a Civil Court on Appeal interfer See *Reg.* v. *Baijo Lall*, I. L. R. 1 Cal., 450.

APPEAL from a decree passed by the Officiating District J of Rungpore, dated the 6th June 1879 affirming the decree o 2nd Moonsiff of that District.

The plaintiff in this case sued to have a kabuliut directe be registered. The Moonsiff dismissed the suit on the ground the kabuliut was not genuine.

The District Judge in appeal affirmed the decree dismissi suit and in his judgment made the following order—"The *facie* grounds for regarding the kabuliut as a forgery are I therefore consider that sufficient grounds exist for Ma enquiry, and direct accordingly, under Section 471 of the C

[CIVIL APPELLATE JURISDICTION.]

1881.
Jan. 31st.
No. 800 of 1879.

SHUMSHER ALI AND ANOTHER (DEFENDANTS), ... APPELLANTS
AND
DOYA BIBI ..... RESPONDENT.

Landlord and Tenant—Title, Denial of Landlord's—Occupancy Ri

The weight of authority of the decisions of the High Court in favour of the view that when a tenant directly repudiates relation of landlord and tenant and sets up an adverse title in hi self, the landlord is entitled to take possession irrespective of t period during which the tenant may have been in possession.

APPEAL from a decree passed by the Second Subordinate Jud of Chittagong, dated the 8th February 1879, reversing the dec of the Moonsiff of Fatikcheri, dated the 25th July 1878.

The plaintiff in this case, it appeared, brought a former suit recover arrears of rent due on a kabuliut. In that suit the defend denied the plaintiff's title, repudiated the kabuliut and claimed hold the land, in respect of which the rent was alleged to be due, rent-free.

The only point decided in that suit was as to the validity of kabuliut, and it was decided against the plaintiff.

The present suit was to recover possession of the land.

The Subordinate Judge held that the title of the plaintiff been made out, but in as much as the defendants had been in pos sion for more than 12 years, he considered that they could not ejected. He, therefore, by his decree declared the plaintiff t entitled to demand rent from the defendants at a fair and equit rent.

The defendants appealed to the High Court.

Baboo *Okhil Chunder Sen*, for the Appellants.

Baboo *Bama Churn Banerjee*, for the Respondent.

The judgment of the High Court (1) which was as follow delivered by

(1) MORRIS and TOTTENHAM, *JJ.*

[CRIMINAL JURISDICTION.]

EMPRESS..... APPELLA

1881.
Mar. 9th.

AND

No. 49 of 1881.

NUDDIAR CHAND SHAW..... RESPON

Act VII (B. C.) of 1878, *Sec.* 60—*Wholesale, Sale of liquors by-ciseable liquors, Sale of—Assortment.*

A licensed retail vendor of exciseable liquors being the only p liable to the penalty provided by Section 60 of Act VII (B. C 1878, the servant of such a vendor is not liable to conviction under that Section.

Quaere: Whether a sale of 12 quarts of beer and 3 bottl brandy is a sale of an assortment of spirituous liquor, and c within Section 15 of the Act.

REFERENCE under Section 296 of the Code of Criminal P dure submitted for the opinion of the High Court by the Se Judge of Hooghly.

The circumstances under which the reference was made, as follows:

One Nuddiar Chand Shaw, servant of a licensed retail v of imported liquors, was convicted by the Joint Magistrate of rah of an offence under Section 60 of the Bengal Excise A 1878, in having, as alleged, sold exciseable imported liquor by sale, and was sentenced to pay a fine of one hundred rupees.

The facts in evidence were that an informer was s instructions to demand the sale to him, by the same transa 12 quart bottles of beer and of 3 quart bottles of bran these quantities of such liquors respectively were supplied to the accused.

The Sessions Judge was of opinion that the sale of th tinct quantities of different kinds of liquor, though in to tity exceeding two gallons, or twelve quart bottles did n to a wholesale sale within the meaning of the Act. He w

1881.

EMPRESS v. NUDDIAR CHAND SHAW.

Judgment.

opinion that in any case the accused being a servant only of the retail vendor was not liable to the Act.

The opinion of the High Court (1) was as follows:

The accused has been convicted under Section 60 of "The Bengal Excise Act," VII (B. C.) of 1878. This Section enacts that "Every licensed retail vendor who sells by wholesale.....shall "be liable for every such offence to a fine not exceeding two hun-"dred rupees."

The Sessions Judge is of opinion that the conviction is bad (1) because the sale of twelve bottles of beer and three bottles of brandy at the same time is not a sale by wholesale; and (2) because the person convicted is not a retail vendor but the servant of such a vendor.

We think that the Sessions Judge is right in his view of law as to the second point.

As to the first point there is more room for doubt. Under Section 15 of the "Bengal Excise Act" the sale of a larger quantity of spirituous or fermented liquors than twelve quart bottles would be a sale by wholesale. If therefore more than twelve bottles of beer or of brandy, *i. e.*, of the same kind of liquor, had been sold at one transaction, this would be a sale by wholesale. In this case two kinds of liquor were sold, and the quantity of neither kind exceeded twelve bottles. The case of such a sale is provided for by a clause of the Section, which is in fact an explanation; cl. 12. "Under this Section a sale of an assortment of spirituous or fermented liquors in greater quantity than is specified above by a licensed retail vendor is prohibited." If this provision stood alone without any other provision following or qualifying it, the sale in the present case would probably be within the prohibition. The Section then goes on to enact:—"The Board may by rule define what shall be held to be an assortment for the purposes of this Section." So far as we have been able to discover, there is no evidence that the Board have made a definition of "an assortment" from which would be excluded such a sale as that in this case, a sale, that is of twelve bottles of beer and three bottles of brandy. This being so, the sale in question probably comes within the prohibition in the Explanation Clause above referred to, but for the

(1) PONTIFEX and FIELD, *JJ.*

1881.

EMPRESS v. NUDDIAR CHAND SHAW.

Judgment.

decision of this case it is not necessary to determine this point, as we think that upon the second ground the conviction must be reversed.

We are clear that the licensed retail vendor himself is the only person liable to the penalty provided by Section 60, and that the servant of such vendor is not liable to conviction under this Section.

We set aside the conviction of Nuddiar Chand Shaw had under Section 60 of "The Bengal Excise Act," acquit him and direct that fine if realized be refunded.

[CIVIL APPELLATE JURISDICTION.]

1881. *Jan. 28th.*

No. 218 of 1880.

KANGALI CHUNDER SHAHA AND ANOTHER (DEFENDANTS) ..... APPELLANTS;

AND

JOMRUDUNNESSA KHANUM (PLAINTIFF) ... RESPONDENT.

Limitation Act, XV of 1877 Schedule II Art. 47—Criminal Procedure Code Act, X of 1872, Chap. XI, Suit to set aside order under.

Chap. XL of Act X of 1872 having been substituted for Chap. XXII of Act XXV of 1861, a suit to set aside an order made in 1875 under Section 530 of the former Act, is governed by the provisions of Art. 47 of Schedule II of Act XV of 1877 and not by that of Act IX of 1871.

Art. 47 of Schedule II of Act XV of 1877 applies both to immoveable and movable property.

APPEAL from an order of the Subordinate Judge of Patna, dated 13th June 1880 reversing the order of the Moonsiff of Bogra dated the 18th December 1879.

This was a case arising from an order made by a Magistrate under Section 530 of Act X of 1872, dated the 30th June 18[illegible]. By this order the defendant was directed to be kept in possession of the land in dispute. Beyond moving before the District Ju[illegible]

1881.

KANGALI CHUNDER SHAHA v. JOMRUDUN-NESSA KHANUN.

Judgment.

limits of the subject of dispute. The proceeding contain definition and which originated the case under Section 530 been put in by either party and is not on the record. As th of the Magistrate is the ostensible cause of action of the in the present suit, and the defendant asserts that these 2 gundas of land are not comprised in the Magistrate's order b ties are to blame for this. We direct therefore that within night of the receipt of the record of this case by the Lower late Court, the plaintiff do put in an authenticated copy of t ceeding of the Magistrate which contains the definition of t which formed the subject of that officer's award. If wit time the plaintiff fails to put in a copy, his suit will be d with costs. But if he puts in a copy within the prescrib the Court will then determine whether these 2 pakis and 5½ of land are comprised or not within the order of the Magist they are, then the suit as to these lands will be dismissed wit if, however, they are not, the Lower Appellate Court will the case to the first Court for trial in respect to them on the

The result is that the order of the Subordinate Judg aside and that of the Moonsiff restored so far as it affects 3 and 8 pakis of the land in suit. As to the remaining 2 p 5½ gundas, the case is remanded to the Lower Appellate be dealt with as directed.

The appellant is entitled to the costs of this appeal. pellant is also entitled to the costs in the Lower Courts in tion to the claim dismissed, but the costs with regard to 2 gundas will abide the result of the suit.

1881.

GUNGAGOTTI PAL v. RAM SUNDER DUT.

Judgment.

subsisting lien on the property in question when Doyal Chund on the 2nd February 1874 executed the mortgage.

The decree of 15th January 1859 was a simple money decree. Numerous applications had been made from time to time for execution of this decree. The attachment under which it was sold to the plaintiff was made on the 18th April 1876, more than two years subsequent to the date of the mortgage.

The Moonsiff held that the attachments made on former applications for execution were not subsisting. He dismissed the suit. The Subordinate Judge on appeal reversed the decision of the Moonsiff, and a second appeal was thereupon preferred by Gungagotti Pal, the defendant No. 3, to the High Court.

Baboo *Doorga Mohun Dass* and Baboo *Chunder Madhub Ghose*, for the Appellant.

Baboo *Hurry Mohun Chuckerbutty*, for the Respondent.

The judgment of the High Court (1) which was as follows was delivered by—

MORRIS *J.*:—The property which is the subject of suit and which the plaintiff seeks to recover, was mortgaged to the defendant No. 1 by Doyal Chund Dey on the 21st Magh 1280, which corresponds with 2nd February 1874. This defendant brought a suit upon the mortgage bond, obtained a decree on the 4th April 1876, providing for the sale of the mortgaged property and in execution of the decree, the property was sold and purchased by the defendant himself on the 6th November 1876.

Subsequently on the 9th Joyst 1284, the Defendant No. 1 sold it privately to the defendant No. 3. The plaintiff seeks to recover this property from these defendants on the ground that his previous to the mortgage lien created in favor of defendant No. 3 it was attached in execution of a decree held by one Sidhi Gopal Misser against Doyal Chand; that in consideration of time being granted to the latter he virtually hypothecated the property for the satisfaction of the decree; that eventually in execution of the said decree it was sold by auction and was purchased by him the plaintiff, on the 10th June 1876, and that so his right to obtain possession accrued some months prior to that of the defendants.

(1) MORRIS and TOTTENHAM, *JJ.*

1880.

GUNGAGOTTI PAL v. RAM SUNDER DUT.

Judgment.

presented a fresh application in the form required by Secti and asked for attachment and sale of certain property de The Court directed execution to be taken out. But subse the judgment-creditor failed to prosecute the matter and eve on the 31st May 1875, the Court on the ground of negli the judgment-creditor again struck the case off the file. question that we have to consider is whether under the o December 31st 1873 the attachment which was then subsisti removed or not. We think that this question must be answ the affirmative. Not only did the judgment-creditor fail expiry of the month allowed to bring the property to sell, delayed till the 30th November 1874 to take action in the And it is manifest from the terms of his own application t understood the previous proceedings to have come to an e the attachment to have been removed, for we find him apply the Court under the terms of Section 212 for a fresh attac It follows therefore that on the 2nd February 1874 on whic the judgment-creditor mortgaged his property to the def No. 1, the attachment did not subsist and that from that da lien existed on the property of the judgment-debtor.

On the second point we differ entirely from the view ta the Subordinate Judge in holding that a money decree can action of either the judgment-creditor or the judgment-de converted into a mortgage decree. The circumstance th judgment-debtor induced the judgment creditor from time to the sale of his property by promise that he would not s property to any body else does not in our opinion conve promise into a mortgage nor can it be binding in law in a this kind either against himself or against a third party. whole therefore we are of opinion that the plaintiff's suit m and the judgment of the Subordinate Judge reversed and the first Court restored and affirmed with costs both in t and in the Court below.

1881.

NOBIN CHUNDER SIRCAR v. GOUR CHUNDER SHAHA.

Judgment.

January 1864 fixing the rent payable by the defendant fo holding at Rs. 139-3-7 pie. It is contended on the one side, no rent at this rate was ever actually realized: on the other there is some evidence to shew that realizations were made; really this point is not very material for the purposes of this s

Shortly after this decree had been obtained the parties m fresh arrangement between themselves and in pursuance o arrangement a kabuliut was executed by the defendants in of Messrs. J. Hill and Co. The rent to be paid according conditions of this kabuliut was Rs. 26 and six annas per a And there were further stipulations in the kabuliut to the that the tenant would grow indigo; and that, if the rent re was not paid and if indigo were not grown, then the whol fixed by the decree of the 25th January 1864 might be levied the defendants. The term of the kabuliut was for eleven and this term expired with the close of the Bengali year Upon the expiry of the term the present plaintiffs who a assignees of Messrs. J. Hill and Co. seek to recover rent fro defendants at the rate of Rs. 139-3-7 pie as fixed by the of 1864.

Now it appears to us that the plaintiffs are not enti succeed in this suit. It may be well to point out, in the fi stance, that the case of the plaintiffs is not that the defe holding over after the expiry of the term of the kabuli bound by the conditions of the kabuliut and are therefore li pay rent according to the terms of that instrument, nor is tended that the defendants have refused to grow indigo; therefore liable under the penalty clause to pay the rent fi the decree. As a matter of fact the plaintiffs do not seek to the conditions of the kabuliut in any way. Their conte that on the expiry of the term of the kabuliut the enhan decree of 1864 revived and has full effect.

In the first place it is to be observed that the decree d contain any direction as to the time for which it is to be hav Those who are conversant with the history of the law of ment of rent in this Presidency are well aware that there h some discussion and difference of opinion as to the length for which the Courts have authority to fix enhanced rent.

[CIVIL APPELLATE JURISDICTION.]

1881. Feb. 2nd.

MAHOMED HAMIDULLA KHAN (PLAINTIFF), APPELLANT;

AND

No. 152 of 1879.

BUDRUNNISSA KHATUN AND OTHERS (DEFENDANTS), ... RESPONDENTS.

Mahomedan Law—"Wuqf"—Settlement—Sadakah—Hedaya, Vol. II, p. 334.

To constitute a valid wuqf there must be a dedication of the property solely to the worship of god or to religious or charitable purposes.

See *Abdul Ganne Kasam* v. *Hussen Mirza Rohimtullah*, 10 Bom. H. C. R. 13; 2 Hedaya, 334.

Semble:—When a settlement under Mahomedan Law is made in favor of a particular person his sons' sons' sons' sons mentioning three generations as long as they may have offspring and then in favour of the poor and needy, such a settlement is only valid as a "wuqf" where the word "sadakah" is used in the deed of settlement.

APPEAL from a decree passed by the Subordinate Judge of Dinagepore, dated the 28th January 1879.

The plaintiff in this case sued as a joint Mutwali with the defendant Budrunnissa Khatun to recover possession of an 8 annas share of Kantabari estate, praying that a sale of a share in the property which had been had in execution against Budrunnissa under a decree obtained by Lutchmeput Singh Roy Bahadoor should be set aside.

The property in question was originally held by one Ghola Sharuff, but it appeared that in Bhadro 1248 he executed an instrument purporting to be a wuqfnamah, under which he set that property together with certain other properties not in dispute as wuqf for religious institutions and charities, appointing his wife the joint Mutwali with himself and, on his demise, his daughter the defendant Budrunnissa, her son's son's son, etc., and the plain-

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is alienable and incapable of being attached and sold in exec of a decree against Budrunnissa.

The Subordinate Judge relying upon a passage which is t found in page 571 of Baillie's Digest of Mahomedan Law, is of opi that the "defendant No. 1," that is Budrunnissa, "became "lutely vested in the 2 annas share out of the 8 annas share of K "bari, and so it became heritable and alienable." The passag question is in these terms: "If one should say, 'This my la "a "*sadakah*" settled on my child, and child of my child, the chi "his loins, and the child of his child in existence on the day of "settlement, and those who are born afterwards are included, and "two generations participate in the produce, but none below them "included, nor the children of daughters according to the "Rewayut; and the *futwa* is in accordance with it. And i "should say, 'upon my child, and child of my child, and chi "the child of my child,' mentioning three generations, the pro "is to be extended upon his children for ever, so long as there "any descendants, and is not to be applied to the poor, &c."

The Lower Court is of opinion that if a person makes a se ment of his land in favour of his descendants to the third genera the poor are absolutely excluded from all benefit in the appro tion, and that consequently the property becomes absolutely v in the descendants of the appropriator. But it seems to us that was meant in this passage is that only so long as the descend survive shall the poor be excluded from the benefit of the ap priation. It becomes necessary therefore to consider whether u Mahomedan Law, the settlement which has been made by Mo Golam Sharuff is of the nature of a valid wuqf. The terms of deed which bear upon this part of the case are as follows: "I "made wuqf of 4 annas in favour of Mussammut Jamila K "*alias* Dhone Bibee, daughter of my daughter, and her descen "as also her descendants' descendants' descendants so long a "may continue to have offspring, and when they no longer exi "in favour of the poor and needy. I have made *wuqf* of t "maining 4 annas in favour of my daughter Bibee Budru "and her descendants, as also her descendants' descendants' "dants how low soever, and when they no longer exist then in "of the poor and needy." And then further on,—"After p

"of the Government Revenue and the Collector's charges, &c., and "after deduction of the Mutwalis towliut right from the proceeds "of all the above-mentioned endowed properties, the surplus, what-"ever it may be, shall be divided as follows: *i. e.*, 4 annas thereof "shall be given to Jamila Khatun *alias* Dhone Bibee, and 4 annas "thereof to Budrunnissa Bibee, in as much as 4 annas share has been "endowed *in favor of each of the said ladies, &c.*"

There has been much argument before us as to the real signification of the term "*wuqf.*" There is no doubt that there is a conflict of authority between Baillie and the other writers on Mahomedan Law, Macnaghten and Hamilton on this subject. But looking to the principal authority the "Hedaya" as read by Aboo Haneefa, who was undoubtedly a Sunni to which sect the family of Golam Sharuff belong, and looking to the doctrines of his disciples, it seems to us that the balance of authority is strongly in favor of the view as stated by the Bombay Court in the case of *Abdul Fazul Kasam* v. *Hussen Mirza Rohimtullah*, 10 Bom. H. C. R., 3, viz., that, "to constitute a valid *wuqf* there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes." Aboo Haneefa undoubtedly in 2 Hedaya, L., 334, points out that the appropriation, that is *wuqf*, must be to some "charitable" purposes.

Now here it is manifest that this appropriation in favour of Budrunnissa is not in the nature of a charity. It is simply in the nature of a settlement upon the daughter, a settlement of property which was to be heritable and to be taken by Budrunnissa's descendants in certain shares. The words are clear, each daughter is to take 4 annas and in the terms of the deed "4 annas share has been "endowed *in favour of each of the said ladies.*" If therefore the principle underlying a *wuqf* is charity and if the ultimate application of property, the subject of "wuqf," must be to objects which never became extinct and those objects are all of a religious and charitable character, then this particular appropriation fails to answer to this description. Consequently the appropriation of the 4th share which is the subject of this appeal, is invalid and cannot be held to be "wuqf."

There is, however, some force in the argument which has been addressed to us that appropriations in the nature of settlement of

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property upon a man and his descendants have been trea various exponents of Mahomedan Law as legitimate appropr under the designation of "wuqf." But these settlements under Mahomedan Law termed *sadakah* and in the view app of Baillie, when a settlement of property is made in this wa man in favor of his descendants the term *sadukah* must be But we do not gather that this term is employed in the deed Bhadro 1248. But further even admitting that under Maho Law appropriations or rather settlements of this character made, it seems to us clear that the present appropriation fa side the principle of "wuqf." As explained in the case referred to in 10 Bom. H. C. R., the doctrine of settlemen entirely upon a saying attributed to the Prophet. "A man subsistence to himself is giving alms," but this doctrine onl good according to Hamilton (2 Hedaya, 351, note), where appropriates *the whole* of his property and so reduces him poverty, in which case the charity is as effectual with respect (where he necessarily reserves a sufficiency from the product own sustenance) as with respect to *any other pauper.*" So validate a "wuqf" by making a settlement of his property self or his descendants a man must in the view taken by the reduce himself to state of absolute property. In the prese it is clear and it is admitted by both sides that there are oth perties vested in the appropriator besides those which are the of this deed. Consequently it cannot be said that Budrunn received this property as a pauper. In both points of view fore it seems to us that this appropriation of a 1/4th sh annas out of 8 annas of Lot Kantabari cannot be treated as *wuqf.* We, therefore, dismiss the appeal with costs.

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been agreed upon on her behalf. The compromise having been sanctioned, the executors very shortly afterwards discovered the existence of property of large value belonging to M, not set out in the petition for probate.

Thereupon the plaintiff brought a suit to set aside the compromise, alleging that it had been brought about through misrepresentations made by the executors in their application for probate, and charging the executors with fraudulent concealment of property. It appeared that the executors might and ought to have known, and had the means of knowing if they had made reasonable and proper enquiry, that M.'s estate was of much larger value than they had represented it to be.

Held, that the compromise had been entered into by the parties and sanctioned by the Court on a serious misapprehension of material facts—which misapprehension was caused either by the actual fraud of, or at any rate by a culpable neglect of duty on the part of the executors, sufficient to amount to fraud in the view of a Court of Equity, and that the case must be remanded to the Lower Court to try all the issues raised in the suit.

Quære per PONTIFEX, *J.*:—Whether it may not be necessary in this suit for the Court to consider whether it will be for the benefit of the infant to set aside the compromise, if the question should arise.

Per PONTIFEX, *J.*:—When the sanction to a compromise on behalf of an infant of the Court is required, it is the duty of each party to see that the materials before the Court are unimpeachable.

Per GARTH, *C. J.*:—Section 20 of the Contract Act seems to be intended to meet a case of this kind, and therefore if the case rests on nothing more than the mistake of both sides and of the Judge who gave the sanction, the compromise should be set aside.

Per GARTH, *C. J.*:—In a substantive suit brought by a minor to set aside a compromise obtained by fraud or mistake, it is not the province of the Court to enquire whether it would or would not be beneficial for the minor that the compromise should be set aside, though it might be otherwise on an application for review made in the former suit, to the Judge who gave the sanction.

APPEAL from a decision passed by WILSON, *J.*:—

The plaintiff who was a minor sued by her next friend to set aside a compromise which had been made between her mother

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ting on her behalf, and the defendants Abdool Azeez and lah, the latter of whom died after the institution of the

ompromise had been sanctioned by the Court in a former he ground upon which it was now sought to be set aside it had been made on the faith of representations to Bibee ch had afterwards turned out to be false.

ON, *J.* dismissed the suit, as he was of opinion, on the hat the representations, upon the faith of which the com- as alleged to have been made, never in fact took place.

this decision the plaintiff appealed. The material facts nd stated at length in the judgment of PONTIFEX, *J.*

ips and *T. A. Apcar*, for the Appellant.

edy and *Bonnerjee*, for the Respondent.

ips referred to the following cases, *Brooke* v. *Lord* De G. J. and S. 373; *Stainton* v. *Carron Co.*, 6 Jur. ; *Rawlins* v. *Wickham*, 3 De G. and J., 304; *Hall* v. . R., 14 Ch. D., 832 and *Gilbert* v. *Endean*, L. R., 9 9.

edy referred to the following additional cases: *Baboo y* v. *Baboo Mahtab Chand*, 10 B. L. R., 35 (S. C.), 14 A., 393. *Trigge* v. *Lavalleé*, 15 Moore's P. C., 270. *Lloyd*, L. R., 10 Ch. D., 327.

ollowing judgments were delivered by the Appellate Court

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IFEX, *J.*:—The plaintiff is a minor and sues by her next set aside a compromise sanctioned by this Court in a t.

at suit her title was stated in the following way :—

Seedickjee of Cashmere carried on large business oper- Calcutta, other parts of British India, and Cashmere. early 50 years ago intestate. His business was carried tnership with Khajah Mussijee and Koondoos Mullick. o sons Khaluckjee and Ackbarjee and a daughter Fatima, he wife of his partner Khajah Musseejee.

after Seedickjee's death his son Ackbarjee had charge of

(1) GARTH, *C. J.* and PONTIFEX, *J.*

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the Calcutta business. That Khajah Musseejee died in 1854 bequeathed the residue of his estate to his son Khajah Mob and Khaluckjee. That Khaluckjee died in 1859 intestate Ackbarjee one of his heirs. That Ackbarjee died in 1868 been jointly interested in the business with Khaluckjee and Musseejee up to the death of the latter; and from hi with Khaluckjee and Moheeudeen until the death of Kha and after his death with Moheeudeen until his own death That Ackbarjee left among other heirs a son, the d Abdool Azeez, and a daughter the infant plaintiff, her sha heir being seven twenty-fourths of the estate left by A That it was alleged that Ackbarjee left a will, by whi giving certain legacies, be bequeathed a sum of Rupees 3 trust for his son Abdool Azeez. That such will contained that Moheeuddeen had given the testator the said Rs. 30,000 in full satisfaction and discharge of all clain he might have against the estate of his deceased brother Kh But the infant plaintiff denied that she had ever gi consent to the will of Ackbarjee which would therefore be in against her.

This suit of the infant plaintiff was instituted on December 1871 against the executors of the will of Ackba against Moheeuddeen; alleging that the latter had posses self of the whole of Ackbarjee's estate.

Now if these allegations were true, Ackbarjee would h a partner in the aforesaid business and interested in the thereof partly on his own account and partly as being on heirs of his brother Khaluckjee.

The infant plaintiff's suit was tried by Mr. Justi He had dismissed the executors named in Ackbarjee's will suit as they had never taken out probate or in any meddled with the estate.

The only question considered by Mr. Justice Phear Moheeudeen was accountable to the plaintiff for assets c come to his hands. In his judgment he said:—Mohe "without doubt the principal defendant in this suit; an "Abdool Azeez now somewhat feebly advances a pers

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But before any progress could be made with the said accounts and inquiries Khajah Moheeudeen died on the 12th of April 1876, leaving a will whereby he appointed Abdool Azeez and Ahmedoolah who are defendants in the present suit his executors. Ahmedoolah had since died.

It is to be observed that the last clause in Ackbarjee's will, even if established to be true by other substantive proof, applies only to his claim in respect of his brother Khaluckjee's estate; and in no way relates to his claim as a partner in the business if such claim can be substantiated. But the amount of this latter claim if substantiated might depend to a very great extent on the true value of the estate of his alleged partner Moheeudeen, who as surviving partner would have succeeded to the entire business. The value and nature of his estate might furnish some index of the value of the business.

On Moheeudeen's death, the original suit was revived as against his executors.

On the 1st of May 1876 Moheeudeen's executors applied to and obtained probate of his will. In their application for probate they stated that Moheeudeen left property in British India, the approximate value of which was Rupees 4,41,124 as shewn in an annexed schedule.

That schedule is set out in the fifth paragraph of the plaint the present suit. Its particulars consist of houses in Calcutta debts due to the deceased in Bombay; debts due to the deceased Bengal; debts due to the deceased from his own Cootee in Umrit and certain personal articles.

According to common form the executors stated that *so far they had been able* to *ascertain and were aware* there was no o property belonging to Moheeudeen in British India besides items specified in the schedule.

It is to be observed that the schedule says nothing what about Government Paper or stocks or shares, or balance at the ceased's Bankers, yet Doorga Churn Law the Banker who has examined, says, "At the time of Moheeudeen's death the bala the account was against us. It was a pretty large balance."

Shortly after probate was granted some negotiations must been entered into for a compromise of the infant plaintiff's For ultimately it was agreed between the adviser of the

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1 Silver watch and a gold chain, ...	200	0	0
1 Old Silver watch and one Singhashun stone, ...	30	0	0
Household furniture including cooking utensils say,.....	250	0	0
Total Rs. ...	4,41,124	0	0

as on reference to the said petition which is now filed of record w more fully appear.

14. That the estate of the said Ackbarjee deceased in case th alleged payment is proved will amount to Rs. 30,000 subject t certain legacies in his said will mentioned; but in case such pay ment is not proved *the same will be a moiety of the estate and effe of the said defendant Khajah Moheeudeen, deceased.*

15. That under the circumstances of the case and considerin the length of time, trouble and expense which have already be involved in this suit, and which may hereafter be entailed in bringi it to close, and considering other difficulties which the plaintiff h to meet in the matter, and with the view to put an end to furth litigation, trouble and expense, and to save the estate from be swallowed up by costs, I, as mother and guardian of the infa plaintiff, and her said step-father as her manager and agent ha under the advice of Counsel, agreed with the defendants to cert terms of settlement in respect of all claims and demands of t infant plaintiff, which terms are hereto annexed and marked A."

The proposed terms of settlement were the following :—

1. "That the defendants do bring into Court Governm Promissory Notes of the 4½ per cent. loan for Rupees 20,00 full of all the plaintiff Bibee Solomon's claims and demand respect of the matters in suit, and in full of all her claims and mands whatsoever against the estate of the late Ackbarjee or a the executors of his will or against Moheeudeen or his heir representatives or his or their estate and effects.

2. "That the said Company's Paper be placed to the c credit of the said Bibee Solomon in this suit and the interest paid out for her benefit during her minority to her moth guardian Bibee Rubia.

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Then there was the further datum, namely, the alle contained in the 15th paragraph of the petition.

Now the sum offered by way of compromise was Rs. of 4½ per cent. Government paper down and all costs, wh ceeded Rs. 5,000.

It was upon those data, and those data only that th approved the compromise by an order dated 10th September

It appears by proceedings in the present suit that Mohe executors paid Rs. 5,000 in respect of costs alone under the

The compromise having been confirmed, the execu Moheeudeen suddenly discover, before the Rupees 20,000 a costs were paid, that property, at all events of the value o lakhs, or as estimated by the plaintiff in this suit of th of 9 lakhs, was belonging to the estate of Moheeudeen tho mentioned in the schedule to the application for probate, petition for the Court's approval.

The order confirming the compromise having been the 11th of September, Mr. Paliologus the defendant's writes on the 20th of September as follows :—

"The Company's papers for Rs. 20,000 and 5,000 your costs are with me, and if you have a copy of the de you please lodge it, or let me have it that I may do so, Company's papers.

"I have this day learnt that two lakhs more of Company belonging to the estate of Moheeudeen have been found, an received instructions to apply that further duty from the e received upon this sum.

"This, however, I think you will agree with me it affects the settlement in this case."

The letter does not say, and there is no evidence when the defendants first learned of this addition testator's estate. And the last paragraph of the letter to is rather suggestive of doubt in the mind of the writer w discovery did not affect the compromise.

But, however that may be, the writer of the let have forgotten that his clients were dealing with a that it might be right to bring this discovery to the Court before payment of the Rupees 20,000 was ma

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of Maheeudeen conducted the negotiations; and represe estate of Moheeudeen to consist only of the property men the application for probate of his will, with the sole excepti house in Cashmere, and that the terms of settlement were on the faith of such representation. The plaint then refer letters of the 20th September 1876 and the 29th of Janua and in the 12th paragraph states that in addition to the C papers for 2 lakhs of rupees other property has been disc belonging to Moheeudeen, consisting of Railway, Bank a shares, houses and other property of the estimated value lakhs of rupees.

The 16th paragraph charges wilful and fraudulent ment, but submits that even if the estate had been unde ted by mistake the settlement should be re-opened. And th 2nd and 6th paragraphs of the prayer are as follows:—

1. "That the said agreement for settlement and decree may be declared not binding upon the plaintiff and set aside or cancelled.

2. "That the accounts ordered to be taken by the s of the 28th March 1876 may be proceeded with.

6. "That so far as may be necessary this suit may dered supplemental to the said suit of the plaintiff and the s Rubea."

The defendant Abdool Azeez alone put in a written s the other defendant Ahmedoolah having died after the i of the suit.

The plaintiff having charged that the executors certain representations, Abdool Azeez in his written denies that allegation, but we have no denial by Ahmed is true that according to the plaintiff's evidence Abdool A self joined in the representations,—nay was the principal making them. This of course he was in a position to in his evidence he admits that "Ahmedoolah took some settlement, but he does not know what part." Obviously he was not in a position to deny the plaintiff's allegation it related to Ahmedoolah.

In the 7th paragraph of his written statement, Ab says:—

barjee mentioned."

Now as a matter of fact we are told that the only evidence ced by the defendants to the plaintiff's advisers in the former with respect to the alleged payment of this rupees 30,000 were in entries in Moheeudeen's books; and that these entries refer Government papers of rupees 10,000 each, which have been ified with 3 papers which Doorga Churn Law, the Banker of eudeen, states, in his evidence in this suit, that he held for eudeen and transferred to Rohim Shaw, the Gomastah of eudeen in December 1875, and May 1876, long after the of Ackbarjee. No doubt this may be capable of explanation, e papers may have got back into Moheeudeen's hands as part e estate of Ackbarjee after his death. But a strong case of cion seems to me to have been raised with respect to the truth e 17th paragraph of the written statement of Abdool Azeez; ularly as Moheeudeen in the former suit does not attempt y on the suggested explanation; and as according to the 's evidence in this suit these papers were never in the name barjee. And if once the story as to the payment of the 30,000 is proved to be a fabrication, the entire case and of Moheeudeen are open to the gravest suspicion.

e learned Judge settled 6 issues in this suit.

"Did the original defendants, the executors, make the ation to Bibee Rubia alleged in the 6th paragraph of the

Did Bibee Rubia agree to the terms of compromise on

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6. "To what relief is the plaintiff entitled and on what ter

Of these it was agreed that only the 1st and 2nd sho tried in the first instance. This course was taken probably t expense to the parties, as for the trial of the other issues it be necessary to bring down witnesses from Cashmere. But I c help thinking that it was unfortunate that this course should been pursued, because in a case of this kind it is especially use investigate the entire case of each party.

In the trial of the two issues the plaintiff's mother and father were respectively examined, and stated that after M udeen's death, first Abdool Azeez came and proposed a compro afterwards Soonaoolah, sometimes with Abdool Azeez and s times alone as his agent; and sometimes Abdool Azeez, Ah oolah and Sonaoolah; and that all three were present at the settlement. They certainly state that Abdool Azeez was principal negotiator.

Abdool Azeez on the other hand in his deposition denies he had anything whatever to do with the negotiation. although he was the principal party interested he makes what s to me to be the following incredible statement: "I was not a "that the settlement was going on. I never came to know o "negotiations going on or of the settlement. I did not kno "the negotiations *until the matter of the payment arose.*"

But he says "Sonaoolah was managing the negotiatio and that "Sonaoolah and Rohim Shaw were acting jointly on behalf in the matter "of the settlement" neither Sonaoolah Rohim Shaw has been called as a witness.

In this state of circumstances the learned Judge has beli Abdool Azeez and disbelieved the plaintiff's mother and step-fa

But if the extent of Moheeudeen's estate was not a fa and an important factor, in the negotiation, it is difficult to u stand why such prominence should have been given to it i petition for the Court's approval.

There must have been some negotiation, and indeed admitted by Abdool Azeez, to have occurred with Ahmed Sonaoolah and Rohim Shaw. And the fact that the p obtained with costs over Rupees 25,000, a sum greatly larg her 7-24th of the rupees 30,000 would seem to indicate th

ther important items had been taken into consideration. It oreover seems difficult not to conclude from the evidence that a ouse in Cashmere was mentioned; and if it was mentioned, in hat other possible connection than the extent of Moheeudeen's tate?

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In trying the first two issues a question was asked by fendant's Counsel of Abdool Azeez as to when he first knew of e addition to Moheeudeen's estate. This question was objected the plaintiff's Counsel and the objection was allowed, probably the ground that the question did not bear on the first two issues. is is an ill-result of trying the two first issues by themselves, for the evidence now stands we do not know whether the defendants re aware of the addition before the compromise and concealed it.

The learned Judge in fact only tried the two first issues, and seems to have decided that if any representation was in fact made was not material and was not an inducing cause of the compromise th the plaintiff's advisers.

Speaking, not as the Judge who approved the compromise but a stranger to that proceeding, I feel bound to say that I think e 5th issue should have been considered; and having regard to e petition upon which the order for compromise was founded, I ould myself consider that the Court was misled in a particular hich according to the 14th paragraph of the petition was material; d the verified petition was the only matter before the Court on hich an opinion could be founded.

Now let us see what were the circumstances under which the ecutors of Moheeudeen allowed that petition to go before the Court.

It must have been well known that Doorga Churn Law was the Banker of Moheeudeen.

Abdool Azeez says that he had heard from Rohim Shaw, the gomastah of Moheeudeen, the particulars of his estate. Doorga Churn Law says that in December 1875, and the 12th of March 1876 he had transferred to Rohim Shaw the Company's paper for Rupees 30,000; and that at Moheeudeen's death which occurred on the 12th April 1876 he had on deposit with him for safe custody the following securities belonging to Moheeudeen's estate: 200 National Bank shares worth Rupees 20,000, 10 Bombay Bank

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shares worth Rupees 6,000; 20 Paris Municipal Debentures w
Rs. 2,000; and 25 East Indian Railway shares worth Rupees 7,
And he also says "at the time of Moheeudeen's death the bal
"of the account was against us. It was a pretty large balai
At the time of the compromise Rohim Shaw was in Calcutta
acted in it as the defendant's agent as Abdool Azeez admits.

Is it conceivable that Rohim Shaw the gomastah had mad
inquiry of Doorga Churn Law, or was ignorant of the existen
the Company's papers for two lakhs or some part of it?

The defendant now admits the existence of these two la
but we do not even now know how, where, or when they were
covered.

Even if the executors were really ignorant of this
addition to the estate at the time of the compromise, though
discovery was made suspiciously soon—10 days—afterwards, w
not such culpable and wilfully blind ignorance, at all events
the securities on deposit with Doorga Churn as to be equivalen
or carry with it the consequences of knowledge? In the case of
v. *Gardiner*, 4 M. and G., 24, C. J. Tindal says "we can in
"regard the possession of the means of knowledge only as af
"ing a strong observation to the jury to induce them to be
"that the party had actual knowledge of the circumstances"
again—"There may be cases where the existence of the mean
"knowledge might lead irresistibly to the inference that the
"had actual knowledge," and Mr. Justice Cresswell added "w
"a party has the means of knowledge it may be evidence of a
"knowledge." Exercising the functions of a jury I think it
be difficult not to arrive at the conclusion that the executo
Moheeudeen had actual knowledge of the securities with D
Churn Law. But with respect to the two lakhs of Company's
I have no materials to form an opinion beyond the suspi
sudden discovery immediately after the sanction of the compr

Now a transaction very similar to this was discussed
Lords Justices in the case of *Brooke* v. *Lord Mostyn*, 2 D
and Sm. 373. In that case a compromise had been appro
the Court on behalf of an infant. For the purposes of th
promise it was necessary to ascertain the value of an e
document relative to the valuation of the estate, and w

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le Justices considered material, was in the possession of the r to be charged and was not produced. On that ground the e Justices set aside the compromise. On appeal to the House rds that decision was reversed but only on questions of fact ot of law.

ord Justice Turner at p. 416 considers what circumstances rnish sufficient ground for impeaching a compromise made the order of the Court. He says with respect to a com- between adults, "If there be no fraud, and equal knowledge th sides, the compromise cannot be disturbed; but if there owledge on one side which is withheld, the compromise ot stand because the withholding of the knowledge amounts e view of a Court of Equity to fraud" and he proceeds to at the rule is the same when a compromise is sanctioned by urt on behalf of an infant.

confess I am myself inclined to think that even a higher of good faith is due when the Court's sanction is required, e that sanction is equally necessary for both parties; and arty is in my opinion bound to see that the materials before urt are unimpeachable. The Lord Justice proceeds, (p. 423,) nay be said perhaps that the Master was satisfied with the rmation laid before him and called for no further information, the question is not whether the Master called for further rmation, but whether *the parties* having this further infor- on in their possession were justified in withholding it."

am of opinion that if the plaintiff's allegations as to the rship are true, which question has not yet been tried, the of Moheeudeen's estate may be material; and that at all the petition for compromise led the Court to believe so; mpromise was confirmed under that impression; and the ntation as to the extent of Moheeudeen's estate in the n was due either to the fraud (which issue has not been or the culpable and wilful ignorance of the executors in ter which it was their duty to have thoroughly inquired nd as to which, at least so far as respects the property rga Churn Law's custody, they had an easy and natural of knowledge.

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I am of opinion, therefore, that the judgment appealed should be reversed, and the case remitted to the lower Co the trial of all the issues.

Of course if the compromise is set aside the parties n replaced in their former positions and the Rupees 20,000 ferred. But it may not be necessary to deal with the Rupee for costs as the plaintiff's admitted rights in the Rupees would exceed that sum.

It may however be questionable whether there may difficulty in trying this case so long as the plaintiff's n continues, as it may be argued that it may be necessary Court to consider whether it will be for the benefit of the to set this compromise aside; and in the consideration question the truth of the plaintiff's allegations in the origi might have to be investigated.

However it will be for the lower Court to consider that question arises. All that we decide now is, that the ca be remitted to the lower Court to try all the issues with to the compromise. The costs of this appeal and of the hearing will abide the result.

GARTH, *C. J.*

GARTH, *C. J.* :—I quite agree that this case has been fectly tried in the Court below; and it seems to me, that th tion of misrepresentation by the executors has been dealt wi by the Court, and by the parties, on too narrow a footing.

The question to be tried, as stated by the learned Judg commencement of his judgment, was this: "Whether th "told by Bibee Rubia and Mahomed Gouse as to the int "and oral communications during the negotiations for a set "are to be accepted as true."

Now it seems to me, that without going minutely i nature of the representations made by the executors, or of th tiations which resulted in the compromise, the following facts are abundantly clear:

1st. That from the very nature of the arrangem actual value of the estate and effects of Moheeudeen wa important matter both for the parties and for the Court t tain, in order to determine whether the proposed compro one, which in the interest of the minor ought to have been ma

1881.

BIBEE SOLOMON v. ABDOOL AZEEZ.

Judgment.

GARTH, *C. J.*

2nd. That the basis of the compromise in that respect, was the statement made by the executors in their petition for probate, confirmed by their subsequent declaration. In the petition to the Court to sanction the compromise, that statement was brought prominently forward,—as the basis of the proposed arrangement.

3rd. That not only Bibee Rubia, but the Court, acted upon the assumption that this statement of the value of Moheeudeen's property was substantially correct, and

4th. That the executors might and ought to have known, and had certainly the means of knowing if they had made proper and reasonable enquiry, that this statement was not true, and that Moheeudeen's property was of much larger value than they had represented.

I think, therefore, that the compromise was entered into by the parties, and sanctioned by the Court, under a serious misapprehension of material facts; and that this misapprehension was caused either by the actual fraud, or, at any rate, by a culpable neglect of duty of the executors, sufficient, as I consider, to amount to fraud in the view of a Court of Equity.

As at present advised, therefore, unless something further should be proved in the Court below, of which I am not aware, I think that the compromise ought to be set aside, and the parties restored to their position and rights in the former suit at the time when it was effected.

I confess, if it were necessary to decide the further question, I should be disposed to set aside the compromise, even though no fraud of any kind has been established, and if it only appeared, that the arrangement had been brought about *by an entire mistake of both parties*, and of *the Court*, with regard to the subject matter of the agreement.

Thus, for example, suppose that in an administration suit, an agreement under the sanction of Court were made with legatees, some of whom were minors, that they should accept a proportionate part of their legacies in satisfaction of the whole, upon the supposition by the parties, and by the Court, that the estate to be administered was not sufficient to pay the legacies in full; and it turned out afterwards that the estate was much larger than was supposed, and that there were ample funds to pay all the legacies in full. It seems to

1881.

BIBEE SOLOMON v. ABDOOL AZEEZ.

Judgment.

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me, as at present advised, that the compromise ought to be set asi under such circumstances on the ground of mutual mistake.

I rather think that section 20 of the Contract Act is intend to meet a case of that kind; and therefore, if this case rested up nothing more than the mistake of both sides and of the Judge w gave the sanction, I think that the compromise should be set asid

There can be no difficulty here, as there might be in some cas in putting both parties *in statu quo*; because all that has been do is the mere payment of rupees 25,000 which can be readily repa or adjusted.

And it seems to me, that this view is by no means opposed the law as laid down by Lord Justice Turner in the case of *Broo* v. *Lord Mostyn*, 2 De G. J. and S., 373, because he was the dealing with a very different state of things, and the question mutual mistake was not present to the mind of the Court.

I should add with regard to the last observation made by m brother Pontifex, that I rather doubt much, whether in a substa tive suit brought by a minor to set aside a compromise obtained fraud or mistake, it is the province of the Court to enquire wheth it would or would not be beneficial for the minor that the compr mise should be set aside. I rather think that this is a question the advisers of the minor only; and that the minor has a right his option to the relief prayed, if it is proved that there are prop grounds for it.

It might be a different matter, if an application were made the learned Judge in the former suit who sanctioned the com mise, to set it aside on a motion for review. He might then to consider perhaps whether it was proper in the minor's intere interfere. But here is a substantive suit to set aside a compro on the ground of equitable fraud; and if the minor *has a rig* the relief prayed, I doubt whether the Court has any power to sider whether it would be beneficial to him to grant the relief.

This, however, will be a question for the Court below to co when the case comes again before it.

[CIVIL APPELLATE JURISDICTION.]

1881.

Feb. 11*th*.
No. 300 of
1880.

GOLOKE CHUNDER MAHINTA AND OTHERS (DECREE-HOLDER), ... APPELLANTS;

AND

SARBOMONGALA DEBI AND ANOTHER (JUDGMENT-DEBTORS, ... RESPONDENTS.

Execution of Mortgage Decree—Act VII (B. C.) of 1868, *Sale under —Mortgage decree, Execution of.*

The purchaser at an auction sale for arrears of Government Revenue of certain land sold subject to all encumbrances having subsequently purchased a decree passed prior to such sale upon a mortgage of the same land, the decree being not only personal against the judgment-debtor but also declared to be a charge upon the mortgaged property, sought to execute this decree against the surplus proceeds of the auction sale lying in in the Collectorate to the credit of the judgment-debtors.

Held, that decree-holder was bound in the first instance to proceed against the mortgaged property.

See *Solano* v. *Moran*, 4 C. L. R., 11.

APPEAL from an order passed by the Subordinate Judge of Backergunje on the 17th August 1880.

The petitioner in this case sought to attach the surplus proceeds of a sale of certain land for arrears of Government Revenue deposited in the Collectorate.

The land in question originally belonged to the judgment-debtors. They, however, mortgaged it and the mortgagee brought a suit and obtained a decree upon the mortgage. This decree was a personal decree, but it also declared that the amount due upon the mortgage should be realized out of the mortgaged property.

After the decree had been obtained the property was sold for arrears of Government Revenue, and it appeared that it was sold

subject to the encumbrances upon it, among which was the de mentioned.

The purchasers were the present petitioners. After their p these latter began to pay off some of the encumbrances. Instead paying off the latter, however, they purchased a moiety of it f the holder and they now sought to execute the decree against which purchase of the one-fifth share of revenue which were in the latter case to the credit of the judgment-debtors.

It was objected that they should first proceed against mortgaged property before seeking to attach the sale proceeds.

Thereupon the petitioners relinquished their lien on the m gaged property. It was then objected that in as much as the p tioners had themselves purchased the property subject to enc brance, they might not be allowed to attach the sale proceeds at

The Subordinate Judge was of opinion that under the circ stances the petitioners should not be allowed to proceed against other property of the judgment-debtor until it appeared that mortgaged property was insufficient to satisfy the decree, and made an order accordingly.

He relied on *Bejnath Sahy* vs. *Doolhin Bissonath Ka* 24 W. R., 83. *Purlit Sing Pershad Misser* v. *Ram Sahoy Sin* 17 W. R., 62 and *Mirza Fazel Ali* v. *Gregory*, 6 W. R. Misc. C.,

The petitioners thereupon appealed to the High Court.

Baboo *Mohiny Mohun Roy*, and Baboo *Jogesh Chunder D* for the Appellants.

Baboo *Bussunt Coomar Bose*, for the Respondents.

The judgment of the High Court (1) was as follows :—

We think that the order of the Subordinate Judge in this ought not to be interfered with, though we do not agree with reasons upon which he has based his decision. The prop Bazyafti Mehal Kulliar Chur, belonged to the judgment-de They mortgaged it to one Kala Chand Mahinta. Kala Chand bro a suit upon the mortgage bond and obtained a decree, which a personal decree, against the judgment-debtors and also a against the mortgaged property. Meanwhile the mortgage perty was brought to sale under the provisions of section Act VII (B. C.) of 1868. That sale was in all respects th

(1) McDonell and Field, *JJ.*

1881.

GOLOKE CHUNDER MAHINTA v. SARBO-MONGALA DEBI.

Judgment.

more. They seek to execute the mortgage decree against t plus sale proceeds which must be taken to represent the the equity of redemption, that is, having purchased and paid equity of redemption and the mortgage lien, they now de only to have the unencumbered property but also to get b whole of the price which they have paid for the equity of r tion. We think that they cannot be allowed to do this.

Under these circumstances we think that so much of th of the Subordinate Judge as directs the surplus sale proceed be taken out until the further orders of the Court, which is an attachment of these sale proceeds until the judgment-debt proceeded against the property, must be expunged. In o spects the order of the Subordinate Judge will be confirm

[CIVIL APPELLATE JURISDICTION]

1881. *Feb. 15th.*

No. 2376 of 1879.

APROOP TEWARI, AND OTHERS (DEFENDANTS)..... APPE

AND

KANDHJEE SAHAY, (PLAINTIFF)..... RESP

Mitakshara Joint Family—Alienation by father for antecede there being an adult son—Consent.

In order to secure an antecedent debt which was not have been incurred for immoral purposes, the father o Mitakshara family mortgaged his "proprietory share" in share in a certain property which he held jointly with son.

Held, that the mortgage must be taken to have the whole interest of both father and son, and that the stood by and allowed the creditor with whom be wa believe he was a consenting party, was bound by the mo

APPEAL from a decree passed by the District Judge o modifying a decree of the Subordinate Judge of that Di the 30th December 1878.

1881.

APROOP TEWARI, v. KANDHJEE SAHAY.

Judgment.

that the whole 2 annas of the property in dispute was in pc of the defendant, in this case under a zur-i-peshgee exec Dabi Pershad, and while the whole share was in his possessio 24th August 1864 Dabi Pershad executed a mortgage bond of one Sree Mundle Das. Dabi Pershad in that bond hypo his "proprietary share" in the mouzah in dispute. A s brought upon that bond by Sreemundle Das against Dabi and a decree was passed on the 7th of June 1865 declari the amount decreed should be levied by the sale of the m property. In the month of February 1866 in execution decree the mortgaged property was sold and purchased defendant. Under that purchase it is not disputed that fendant acquired possession of the whole 2 annas share. was brought on the 6th August 1878. Intermediately suit had been brought under the same cause of action, bu dismissed by the Moonsiff in whose Court it was brough ground of want of jurisdiction. Various objections have b by the defendants against the plaintiff's suit and the Low have overruled them all. Some of them have been also t fore us in this appeal, but it would be convenient to take the 8th and 9th grounds mentioned in the petition o These two grounds raise the question which is in issue bet parties as regards the title to the property. It is contende us that the decision of the Lower Courts that what was only the interest of Dabi Pershad is erroneous, the pr resulting in the execution sale taken together with the bo year 1864, it is contended, show that what was sold was t family property. The District Judge decides this point as "It appears from the bond of the 24th August 1864, "mortgage was of Dabi Pershad's right, title and intere "out any specification of share. It appears again from "of the 7th June 1865 on that bond, that there was n "of any specific share, but only of the right, title a "Finally the proceeding of the 19th March 1866, confi "sale, shows clearly that it was only Dabi Pershad's righ "interest that passed at the sale to the auction purcha it appears to us that the District Judge is not right in t tion which he has put upon the bond of the 24th of A

1861.

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Judgment.

ıbt the words used in the bond by which the hypothecation ected were "my proprietory share" but the share specified was the share of the family as contra-distinguished from ares of other coparceners rights. According to the true e which governs the relations of members constituting a Hindoo family under the Mitakshara law Dabi Pershad the ould not predicate of his interest in the joint property as ting his *share*. The plaintiff's case is that at the time of tgage the family property was joint. Under these circum- it seems to us that the bond rightly construed hypothecated ole share in the disputed mouzah which was held by the nily. In this view of the bond it would follow that the nd the sale also referred to the mortgaged property, namely, e held and owned by the joint family; and if the plaintiff ase had been a minor at the time of the mortgage the suit the father would, in accordance with numerous decisions, n held as brought against him in his representative charac- esenting the joint family. But in this case the plaintiff ined majority before the mortgage of 24th the August 1864 uted, and therefore the answer to the question whether or plaintiff is bound by the mortgage and the subsequent ould depend upon the enquiry into certain questions of ich I shall indicate hereafter, but upon which questions of e has been no decision by the Lower Appellate Court. The a this subject is contained in paras. 28 and 29 Chapter on 1 of the Mitakshara. The author of the Mitakshara of the power of alienation of a single member of a joint says in para. 28: "An exception to it follows. Even a individual may conclude a donation, mortgage, or sale, of able property, during a season of distress, for the sake of mily, and especially for pious purposes" and in para, 29 he to say—"The meaning of that text is this: while the nd grandsons are minors, and incapable of giving their t to a gift and the like, or while brothers are so and con- nseparated, even one person, who is capable, may conclude hypothecation or sale, of immovable property, if a calamity ng the whole family require it, or the support of the family it necessary, or indispensable duties, such as the obsequies father or the like, make it unavoidable."

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Judgment.

From these two paragraphs it is clear that where the co-ceners are all adults, the sale by one of them would not be v unless made with the consent of the rest; but if some of them minors, the members who are adults may make a valid alienatio the family property under the conditions mentioned in para. It has been held by the Judicial Committee of the Privy Co that it is is a pious duty for a son, under the Mitakshara law pay such debts of his father as were not contracted for imn purposes; and according to the Hindoo law, it is also a pious of a person to pay off his own debts. It has been held by Lordships of the Judicial Committee that from these two positions it follows that an alienation by a father living jo with his sons under the Mitakshara law, to pay off his antec debts, which debts are not proved to have been incurred for imn purposes, is an alienation for the performance of indispen duties within the meaning of para. 29, Chapter 1 Section 1 o Mitakshara. In this case, therefore, if the alienation, namely mortgage of the 24th August 1864 had been made for the pu of paying off an antecedent debt and if the plaintiff had been a minor, the mortgage would have been binding upon him; b appears that the plaintiff, at that time was of age, and ther as already pointed out, the mere circumstance of the existen an antecedent debt would not be sufficient to bind him. I must be proved that he was a consenting party to that transa His consent might have been express or implied. If he sto and thereby allowed the creditor with whom his father was d to believe that he was a consenting party, the transaction wo binding upon him. This question was raised in the following "Whether or not the bond, the decree and the auction sal "executed, passed and held with the knowledge of the pl "if so, would that operate as an estoppel against the plaintiff all these proceedings were held with the knowledge of the pl it seems to us that it would be a fair inference from that c stance that the plaintiff was a consenting party to the transaction. The circumstance that under the purchase year 1866 the defendants obtained possession of the whol property, and remained in possession of it for about 12 y also a material bearing upon this question. As it is a qu

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ut we cannot in this Second Appeal deal with it. We must, therefore, remit the record to the Lower Court in order that it may, with reference to the observations made above, and the evidence upon the record, come to a finding upon it.

We reserve at present our opinion upon the other questions raised in this appeal, and the appeal will be finally disposed of as soon as the record and the finding of the Lower Court come up.

We reserve the question of the costs of this hearing.

[CRIMINAL JURISDICTION.]

1881.
Feb. 9th

No. 8/1 of 1880.

EMPRESS, ...

AND

M. J. VYAPOORY MOODILIAR, ...

Evidence Act, I of 1872 *Secs.* 5, 6, 8, 11, 14—*Evidence, on Criminal trial, of unconnected acts of same nature as those charged.*

In a trial upon three specific charges of receiving illegal gratification from the firm of C. and Co., at T. in 1876, evidence of similar but unconnected instances of receiving illegal gratifications from the same firm at Thayetmyo in the years 1877 and 1878 was offered.

Held, that such evidence was inadmissible.

Per MITTER, *J.* :—If the receipt of the several sums mentioned in the charges be considered to have been proved by *other* evidence, and if it were necessary to ascertain whether the accused received them as a *motive* for showing favour in the exercise of his official functions, the alleged transactions of 1877 and 1878 might be relevant under Sec. 14 of the Evidence Act; but they are not relevant for the purpose of establishing the fact of payment in 1876.

REFERENCE submitted by the officiating Judges of the Special Court at Rangoon, under Section 80 of the Burmah Courts Act, XVII of 1875 for the opinion of the High Court.

1881.

EMPEROR
v.
MAUNG THA-
YAT
MYAING.

The point on which the Judges of the Special Court differ is thus stated by them:

The accused was charged under Sec. 161 of the Indian Penal Code with receiving illegal gratifications on three distinct occasions at Tonghoo in the year 1876 from the firm of Cohen and Co. There were also three counts charging him under Sec. 165 of the Indian Penal Code with reference to the same sums. He was tried by the Additional Recorder and a jury and acquitted by a majority of the jury on all the charges, and the Additional Recorder dissenting from the opinion of the majority, referred the case to the Special Court under Sec. 263 of the Criminal Procedure Code.

At the trial evidence was admitted of similar but unconnected receipts of illegal gratifications by the accused from the same firm of Cohen and Co. during the years 1877 and 1878 at Thayetmyo. At both places and in the three years 1876, 1877 and 1878 the firm of Cohen and Co. were doing business as Commissariat Contractors, and the accused was the manager of the Commissariat office first at Tonghoo and then at Thayetmyo.

The Officiating Judicial Commissioner at the hearing before the Special Court was of opinion that the evidence as to the similar but unconnected receipts of illegal gratifications at Thayetmyo during the years 1877 and 1878 was not admissible to prove the specific charges relating to the year 1876, and therefore that that the verdict of the majority of the jury acquitting the accused should not be interfered with. The Additional Recorder was of opinion that that evidence was admissible, and that the verdict of the majority of the jury should be reversed.

The Officiating Judges being unable to agree in a judgment, therefore referred the case under Sec. 80 of the Burmah Courts Act XVII of 1875, to the High Court of Judicature at Fort William.

The point as to which the Officiating Judges differ is as follows:

Whether in trying the three specific charges of receiving illegal gratifications from the firm of Cohen and Co. at Tonghoo in 1876, evidence of similar but unconnected instances of receiving illegal gratifications from the same firm at Thayetmyo in the years 1877 and 1878 is admissible.

Phillips (Standing Counsel) for the Crown. No one appeared for the prisoner.

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Judgment.

GARTH, *C. J.*

the probability that if sums were received by the prisoner from them for an illegal consideration in that year, the sums which were received from them by the prisoner in the previous year, were also for an illegal consideration.

I believe that we are all agreed, that this evidence was not admissible under any of the Sections from 5 to 13 of the Evidence Act; but my brother Mitter is of opinion that it might be admissible under Section 14 upon the grounds stated in his judgment.

After carefully considering this point, and the authorities to which our attention was called by Mr. Phillips, I have come to the conclusion that the evidence was not admissible.

Section 14 seems to me to apply to that class of cases which is discussed in Taylor on Evidence, 6th Edition, Sections 318 to 323; that is to say, cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it;—as for instance, in actions of slander, or false imprisonment, or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show, that the defendant was actuated by spite or enmity against the plaintiff, or again, on a charge of uttering counterfeit coin, evidence is admissible to show, that the prisoner knew the coin to be counterfeit, because he had other similar coin in his possession, or had passed such coin before or after the particular occasion which formed the subject of the charge.

The illustrations to Section 14, as well as the authorities cited in Taylor, show with sufficient clearness the sort of cases in which this evidence is receivable.

But I think we must be very careful not to extend the operation of the Section to other cases, where the question of guilt or innocence depends upon *actual facts;* and *not upon the state of a man's mind or feeling.* We have no right to prove that a man committed theft or any other crime on one occasion, by showing that he committed similar crimes on other occasions.

Suppose for example that usury was a crime by the law of this country, and that a prisoner was charged with having taken usurious interest from A. B. in a transaction which occurred in 1870. It seems quite clear to me that for the purpose of proving the nature of this transaction in 1870, evidence could not be given

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EMPRESS v. M. J. VYAPOORY MOODILIAR.

Judgment.

MITTER, J.

happened in the year 1876. The accused was the managing d in the Commissariat office at Tonghoo in the year 1876, w the Cohens transacted business as Commissariat contractors. evidence for the prosecution is, that there was an understan between the Cohens and the accused, under which he had ag for certain remuneration to show to them certain favor in the ercise of his official functions; that this agreement came to an in January 1877, when the accused was transferred to the Com sariat office at Thayetmyo. That in the month of June of year the Cohens who also transacted business as Commissariat tractors at the latter place, entered into a similar agreement the accused, and the evidence of payments of money to hi 1877 and 1878 at Thayetmyo under the last mentioned agree was adduced in the course of the trial. The question of law has been referred to us is as follows:—Whether in trying the specific charges of receiving illegal gratifications from the firm Cohen and Co. at Tonghoo in 1876, evidence of similar but u nected instances of receiving illegal gratifications from the firm at Thayetmyo in the years 1877 and 1878 is admissible.

I am of opinion that receipt of illegal gratification in the 1877 and 1878 at Thayetmyo cannot be proved in order to est that the accused received the three sums of money mentioned charges for which he was tried.

The two sets of transactions are not so connected as make them relevant to one another within Sections 5 to 14 Evidence Act.

Section 6 cannot apply, because the payments of 18 1878 are not connected with the facts in issue in this cas form part of the same transaction. The alleged agreement according to the case for the prosecution came to an end in J 1877, and the alleged payments in 1877 and 1878 were have been made under a different understanding.

The next section, under which it was contended in th Court that the transactions in 1877 and 1878 were relev Section 8. But it seems to me that it cannot be said that t or constitute a motive or preparation for the facts in issue. can the conduct of the accused as shewn in the alleged tr of 1877 and 1878, be said to have been influenced by the

[CRIMINAL JURISDICTION.]

1881. *March 9th.*

No. 87 of 1881.

IN THE MATTER OF SHAIKH AGHANI, ...

AND

BHAGI HALWAI, ...

Penal Code Act XLV of 1860 *Section* 379 *Distraint—Act VI (B. C.) of* 1869 *Section* 6.

Persons removing property under the provisions of the B Law relating to distraint ought not to be proceeded against un the Criminal Law, but the parties aggrieved by a wrongful distra should have recourse to the remedy provided by Act VIII (B. C of 1869.

REFERENCE submitted under Section 296 of the Code of Cri nal Procedure by the officiating Sessions Judge of Tirhoot for opinion of the High Court.

The terms of the Reference as stated were as follows :—

"One Shaikh Aghani preferred a complaint to the Magist of Durbhangah, stating that he held 15 cottas of land under accused No. 1, Turunt Lall Chowdhri, who on account of declining to lend him the use of his plough came with his bro Gobind Lall and some 30 or 40 men upon this land, and cut carried away his crop of paddy growing thereon. At the trial accused, Turunt Lall Chowdhri, stated that the land and cr question belonged to a ryot of his, named Muhbub, and that h legally distrained his crops for arrears of rent, and that he a servants were therefore not guilty of theft.

The Joint-Magistrate who tried the case in a very short ment, in which he did not review the evidence adduced b parties, held that the land and crop were in the complainant's sion, and that under colour of distraint proceedings the acc and removed the crop and were therefore guilty of theft; sentenced Turunt Lall Chowdhri to pay a fine of Rs. 1 default to undergo 2 months rigorous imprisonment, a

881.

In re of LAIKH GHASI v. BHAGI HALWAI.

Judgment.

subject of distraint, and to hold that under such circumstances h and his servants have been guilty of theft would, it appears to me be overstraining the definition of theft as given in section 378 o the Penal Code. The complainant's proper remedy lies in a sui under section 96 of the Rent Law.

* * * *

As I am of opinion that on the admitted fact the offence o theft has not been established, I respectfully submit that the con viction and sentence as regards the accused Bhagi Halwai should b quashed, and the fine or any portion of it, if realized, should b refunded to him by the orders of the Honorable Court."

The opinion of the High Court (1) was as follows :—

We agree with the Sessions Judge in this case, and we revers the conviction of the petition Bhagi Halwai. The persons errone ously convicted of theft were clearly acting under cover of th provisions of the Rent Law relating to distraint, and that la provides damages for the abuse of these provisions. The partie concerned, if aggrieved, should have resorted to the remedy so pro vided, and should not have set the criminal law in motion.

The conviction of Bhagi Halwai is set aside, and the fine, realized, must be refunded.

(1) PONTIFEX and FIELD, *JJ.*

1881.

In re of EHALA BIBI.

Judgment.

is more true than that about Rakhal: and there is no good reason why the judge should adopt one story rather than the other.

As to what the woman stated about Rakhal, the evidence is very meagre as to the exact language and the exact occasion upon which this language was used; and the statement as given by the Police officer, Bireshur, is certainly not information respecting the murderer of Ujjala, for she said merely that Rakhal had taken the child away after expressing an intention of leaving it with its father.

The unfortunate woman appears to have disappeared by night from her husband's side, and there is much reason to suppose that she took her infant with her. She was found some time after without her infant, which was of too tender an age to take care of itself. Under these circumstances grave suspicion attached to the woman. When she was arrested, she made contradictory statements as to what she had done with the child. Her manifest object in making these statements was to exculpate herself. We think that Section 201 of the Penal Code was not intended to apply to such a case—a case, that is, in which the person, who is the possible or probable offender makes statements exculpating himself by inculpating another.

That Herasatula murdered the child, and that Behala knowing this gave information respecting the murder, with the intention of screening Herasatula from punishment rests upon no evidence. We reverse the conviction and direct the release of the appellant Behala.

80.

DHRY DUT GH r. RUK RAIN GH.

ment.

The defendant pleaded that the claim was barred under A of Sch. II of Act XV of 1877; that no interest was recoverable being no agreement to that effect, and that the revenue paid plaintiff had been set off against defendant's demands fro plaintiff.

The plaintiff's claim having been allowed in the lower the defendant appealed to the High Court.

Baboo *Doorga Pershad* for the Appellant.

Baboo *Prannath Pundit* for the Respondent.

The judgment of the High Court (1) was as follows :—

This is a suit to recover Rs. 439-6, being money plaintiff between September 1866 and August 1878, as reve a mouzah Tulsipur belonging to defendant with interest t Plaintiff held the other mouzahs of defendant's estate under a wufa and lease by the conditions of which he was to revenue of them, there being no obligation on him to p revenue of Tulsipur. But his allegation is that defendant ne to pay the revenue of Tulsipur and that the plaintiff was th compelled to do so.

The defence was (*a*) that by Art. 99 of Schedule II XV of 1877 plaintiff's suit was wholly barred; (*b*) that the p

(1) MITTER and MACLEAN, *JJ.*

DEO NUNDUN AGHIA, (DEFENDANT) ..... APP

AND

DESHPUTTY SINGH, (PLAINTIFF) ..... RES

Appeal from a decision passed by the Officiating District Judge of S dated the 8th of June 1876, affirming the decree of he 2nd Moonsiff o dated the 11th of December 1875.

Baboo *Mohesh Chunder Chowdhry*, for the Appellant.

Baboo *Unnoda Pershad Banerjee and Chunder Madhab Ghose*, for the Re

This appeal was decided on the 23rd May 1877 and the following were delivered :

JACKSON, *J.* :—The language of this plaint is somewhat obscure but think, be collected from it that the object of the plaintiff was to enforce which, according to his contention the law imposed upon a portion of called taluq Bhusuha by reason of payment by plaintiff of the Gu revenue, which was properly payable by the co-sharer holding this mouzah, the mouzah having subsequently to the arising of the charge and suit for contribution was brought, passed into the hands of the present

revenue of Tulsipur by arrangement receiving a correspond-
ction of his rent. This last plea was decided against the
t in both the lower Courts, and although allusion is made

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pressly stated so far as I can see in the plaint, but I think we must take
purchaser acquired this mouzah and so became a co-proprietor of the
r with the knowledge or with means of knowledge of which he might
d himself, that this property had come to him so burthened. He was
y a purchaser with notice.

urts below have concurred in holding that the defendant was liable to
le amount sued for, that is to say, the amount of Rupees 1004 being the
he decree less a payment of Rs. 51. It appears that the first step which
ff took after having paid the whole of the Government revenue
ng a suit against his co-sharers and to obtain a decree making them all
severally liable for the entire amount so paid. That decree was no
neous according to the decisions of this Court, but it was not altered on
do I understand that any appeal was preferred against it. Now, on the
hether the amount paid by the co-sharer on behalf of his co-proprietors
e on the estate. I think we may safely follow the judgment of my
ARKBY and MITTER in 22 W. R., 411, and I say this with more con-
use that decision rests in some degree upon a dictum of the Judicial
of the Privy Council in the case of *Nogender Chunder Ghose*, 11
A., 241. Their Lordships say in a somewhat similar case that
been the only point for decision they would have had some difficulty
o any other conclusion than that the money paid by the co-sharer
circumstances was a charge upon the estate. So far therefore I agree
urt below. Then the question arises to what extent the plaintiff had
. The Lower Appellate Court appears to have held that the charge
s regards the share of the defendant, to the whole extent of the amount
the plaintiff. That is a mistake. It is a charge, no doubt, against the
nasmuch as according to the precedents of this Court the decree to be
y him should have been a decree defining the liability of each owner, it
low that the charge which he would have would be against each portion
to the extent to which the owner of that portion was liable at the time
payment was made. I think therefore that the decree as against the
fter allowing for the payment made Rs. 51, should have been only for
tead of Rs. 992.

stion was raised as to whether this suit was barred by the Statute of
. It seems hardly necessary to consider whether under the peculiar
es the plaintiff would have been barred in this suit if his period of
had been shorter. But I think it is sufficient to say that so far as we
provisions of Art. 132 of Schedule II of the Act (IX of 1871) apply, this
for the recovery of money charged upon immovable property. The Legis-
t state that the charge must be an express charge created by deed or
nd in the absence of any words to the contrary. I think we are justified

1880.

CHOWDHRY RAM DUT SINGH v. HURUK NARAIN SINGH.

Judgment.

to it in the last ground of appeal it has not been mooted before u
But the lower Courts have held that Art. 132 and not Art.
of Schedule II applies, on the authority of 25 W. R., 411 and
unreported decision of this Court in Special Appeal 1913 of 1876.
Deo Nundun Agha v. *Desputty Singh,* ante 210. Before us
is again urged that Art. 99 applies—that Art. 132 does not, a
that plaintiff is not entitled to interest and to a declaration of l
on the mouzah.

We think Art. 99 has no application to the case, plain
having paid the money neither under a decree nor as a joint p
prietor of the estate. Plaintiff is undoubtedly entitled to reco
the money under Section 9 of Act XI of 1859, and he might a
under that Section have retained his lien on the other mouzahs
the estate till his money had been paid. He is equally entitled
recover his money under Section 69 of the Contract Act, a
we think that the liability to pay the revenue was not merel
personal liability of the defendant, but was also a liability impo
upon the defendant's estate—*Mothuranath Chuttopadhya* v. *Kri*
Kumar Ghose, I. L. R. 4 Cal., 369.

As regards the period of limitation, we are unable to dist
guish the case from that of *Deo Nundun Agha* v. *Desputty Sin*
and we therefore concur in thinking that Art. 132 applies.
see no reason why plaintiff should not recover interest on
money, nor do we object to his obtaining a declaration that
money is recoverable by sale of mouzah Tulsipur though it w
have been better if he had asked for recovery by sale of the e
estate.

The appeal will therefore be dismissed with costs.

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in accepting such a construction as the present. I think that with the va
that I have mentioned the judgment of the Court below must be affirmed, and
paying his own costs of this appeal. In the Courts below the plaintiff w
costs upon the amount which is allowed and the defendant will pay his own

WHITE, *J.*:—I concur.

1881. Official Assignee could not be sold in execution of that decree, and
A. I. Mackenzie be made an order accordingly.
v.
Mahomed Ali and Others. An appeal was thereupon preferred to the District Judge, who held that the estate vested in the Official Assignee subject to the existing attachment before judgment, and directed the sale to be proceeded with in respect of the property of all the members of the firm.

Against that order the appeal was preferred to the High Court by the Official Assignee.

Baboo *N. Mullick* and Baboo *Saligram Singh*, for the Appellants.

Baboo *G. Das Banerjee* and Baboo *Rash Behary Ghose*, for the Respondent.

The judgment of the High Court (1), which was as follows, was delivered by—

MORRIS, *J.*:—We think that an attachment before judgment cannot have effect against the Official Assignee who holds the property of the judgment-debtors under a vesting order of Court made before the decree in question was passed. The District Judge comes to the opposite conclusion on the authority of the case of *Annoda Chunder Pal* v. *Prosunno Sarma*, 5 B. L. R., 691. But that case differs in two material respects from the present case. In it the question was whether attachment after judgment shall have priority over the vesting order, and not, as here, attachment before judgment. And secondly that case was governed by the procedure prescribed in Act VIII of 1859 under which the first attaching creditor had priority over other judgment-creditors. But no such priority is allowed under the present Procedure Code, Act X of 1877. It seems to us that this point, viz., that attachment before judgment does not take priority over the vesting order has been distinctly ruled in the cases:—*In the matter of Gocool Doss Soonderjee*, 1 Ind. Jur., New Series, 327; *Bank of Bengal* v. *Newton*, 12 B. L. R., Apx. 1, and *Gamble* v. *Bholagir*, 2 Bom. H. C. R., 146. In the last case Sir RICHARD COUCH says distinctly that an attachment before judgment "cannot be regarded as the inception of an

(1) MORRIS and TOTTENHAM, *JJ.*

1881.

In re of JAMARIA.

Judgment.

to any one competent to act upon it. Enquiries were therefc made as to the powers (Magisterial or Police) of the Station St Officer.

From the papers it will be seen that he has no such powers.

The appellant appeared before Captain Simpson, Adjutant 11 M. N. I. and Station Staff Officer, and charged a non-commissior officer with rape. There was an enquiry and the charge bei found to be false by the Military Authorities, the Commandi Officer caused the appellant to be prosecuted before the Crimir Authorities under Section 211. She was committed for trial a convicted by the Judicial Commissioner, under that Section.

We are of opinion that the appellant neither instituted r caused to be instituted a criminal proceeding. She no dou charged the non-commissioned officer with an offence, but the Stati Staff Officer having neither Magisterial nor Police powers, as are informed, it seems to us that Section 211 will not apply. W do not think it is unduly refining the words of the Section to s that the false charge must be made to a Court, or to an officer w has powers to investigate and send up for trial.

We therefore set aside the conviction and direct the appellan discharge.

[CRIMINAL JURISDICTION.]

1881.
March 4th.

No. 37 of 1881.

GOBIND CHUNDER MOITRA ..... APPELLANT;

AND

ABDUL SYAD AND OTHERS ..... RESPONDENTS.

Criminal Procedure Code Act X of 1872, *Section* 530—*Jurisdiction of Magistrate—Magistrate's duty to maintain decree or order of competent Court—Land Registration Act, Order under, as to possession—"Dispute,"—Breach of Peace—Act X of* 1872, *Section* 491.

The principle that where there has been a decree passed between rival claimants to immoveable property, it is the duty of the magistrate to maintain such decree, is applicable to orders in proceedings under the Land Registration Act declaring a particular person in possession.

Accordingly where an order had been made under that Act, in the presence of both parties, and after evidence taken on both sides, declaring one of the parties to have proved possession, and entitled to have his name registered, and pending the confirmation of that order, disputes arose as to the land in question, it was *held*, on the ground that when the rights of the parties had been determined by a competent Court, there was no longer a "dispute" within the meaning of that Section 530 of the Code of Criminal Procedure, that it was not competent to the Magistrate to take proceedings under that Section.

The proper course for a Magistrate to pursue if the unsuccessful party does any act that may probably occasion a breach of the peace is to take action under Section 491 of the Code of Criminal Procedure.

RULE to show cause why an order passed by the Deputy Magistrate of Pubna on the 20th January 1881 should not be set aside. The circumstances under which the Rule was obtained appear from the judgments delivered by the Divisional Bench of the High Court by which the case was heard.

1881.

GOBIND CHUNDER MOITRA v. ABDUL SYAD.

Judgment.

PONTIFEX, J.

H. Bell, and Baboo *Ishun Chunder Chuckerbutty* in su of the Rule.

Lee and Baboo *Tarack Nath Palit* showed cause.

The following judgments were delivered by the High Court

PONTIFEX, *J.*:—I think this Rule must be made absolute an order of the Deputy Magistrate must be discharged. In giving reasons for this decision it is necessary to advert shortly to som cumstances which preceded the order made by the Deputy Magis The person asking for the Rule is one Gobind Chunder Moitra alleges that in March 1879 he purchased the property with re to which the order, which he seeks now to set aside, was made Section 530 of the Code of Criminal Procedure; the date of order being the 20th January 1881. On the 20th March Gobind Chunder applied under the Land Registration Act to the land registered in his name. The decision of the D Collector, in which he found that Gobind Chunder had proved session and was entitled to Registration, was not passed unt 24th December 1879.

Now it appears that prior to this alleged purchase by G Chunder Moitra, Abdool Sayed and Abdool Mayid who now o the Rule had obtained registration of the property in their names the Land Registration Act, on the 6th March 1879. It was fore impossible for the Deputy Collector on the 24th Dec 1879 to direct that the land should be registered in the na Gobind Chunder Moitra. It was necessary that for that p his proceedings should go up to the Commissioner who, if he firmed the decision of the Deputy Collector, alone had the po direct that the registration in the names of Abdool Say Abdool Mayid should be cancelled in order that registration be effected in the name of Gobind Chunder Moitra. The ings accordingly went before the Commissioner, but it was the 29th September 1880, that he passed his final orders, a those orders, in the month of October 1880, the regis the names of Abdool Sayid and Abdool Mayid was can Gobind Chunder Moitra's name was finally registered. registration proceedings, therefore, occupied a period exte

(1) PONTIFEX and FIELD, *JJ.*

1881.

GOBIND CHUNDER MOITRA v. ABDUL SYAD.

Judgment.

PONTIFEX, J.

3th March 1879 to October 1880. It must however have manifest to Abdool Sayid and Abdool Mayid, from the 24th iber 1879, when the Deputy Collector decided in favor of d Chunder's possession, that there was every probability that sult of the proceedings would be that the property would be red in the name of Gobind Chundra Moitra. As it seems to evade these consequences, and while the reference was pend- fore the Commissioner in order that his ultimate orders might ined, recourse was had to proceedings under Section 530, were commenced in July 1880.

a the registration proceedings under the Land Registration Act puty Collector had decided the question in the presence of rties. Each party had had an ample opportunity of ad- all the evidence that he thought necessary to prove his case. party did adduce evidence and upon that evidence the Deputy or acting under the Land Registration Act, finally decided that l Chunder Moitra *had proved possession* and that he was l to have his name registered. Now, the Criminal proceed- July 1880 were started by certain ryots submitting a n of complaint alleging that other of the ryots at the instiga- Gobind Chunder Moitra were going to do certain acts which tend to a breach of the peace. Upon the receipt of that int a police report was called for and a report was accord- made by the police. Their report is that there were two s who claimed to be landlords; that certain of the ryots took t of one side and others of the other side, and that at a future hen the crops came to be cut, it was probable that the ryots side might cut the crops which had been grown by the other nd a breach of the peace might ensue. But the police recom- l that it would be sufficient if the leading ryots on either re bound over to keep the peace. Upon that report the t Magistrate, who possibly had no notice of the registration lings, held a proceeding under Section 530 and referred it to puty Magistrate who was the very same person who as Collector had decided the land registration case in favor ind Chunder Moitra, finding that he had proved that he was session of this property. The Deputy Magistrate took e with respect to the complaint under Section 530. There thing in the police report to implicate Gobind Chunder

Moitra in any of the acts out of which it was suspected a brea the peace might ensue. The police had only implicated the r But notwithstanding the Deputy Magistrate, in his offic Deputy Collector, had, so recently and after a full investiga decided that possession was in Gobind Chunder Moitra, he sidered that he might altogether disregard his prior proceedin Deputy Collector and proceed again under Section 530 to deter who was in actual possession of this land, being the very question which he had already tried and decided.

Now, in my opinion the fact that these registration proce were pending at the time that the application was made for i ference under the Criminal Procedure Code should have mad Deputy Magistrate extremely careful not to make any order i possession under Section 530, unless he was quite satisfied t *bonâ fide* dispute existed, and that a breach of the peace was i nent. The Meahs knowing that the registration proceedings c under ordinary circumstances, only properly be set aside regular suit thought they might avoid being obliged to res that remedy if they could set the Criminal Court in motion u Section 530, and hence this alleged quarrel between the ryot the application to the District Magistrate.

Unfortunately the Deputy Magistrate altogether disrega the former order that he made after a full trial has now en rendered nugatory his order of October 1880. In my opinio Deputy Magistrate knowing that the land registration proce only awaited formal completion, ought not to have proceeded Section 530 to deal with the question of possession; a qu which he had himself so recently decided in the presence of parties. It would have been quite sufficient, if he thought a l of the peace was imminent, to bind over the leading ryots on side as recommended by the police. There was nothing to from the police report that Gobind Chunder Moitra was impl in the acts complained of, and it seems to me, in passing the in respect of possession and in setting aside his own orde Deputy Magistrate was acting improperly and unfairly to G Chunder Moitra. It was never intended that the provisi Section 530 should be used for the purpose of avoiding a d so recently arrived at after a full trial.

1881.

GOBIND CHUNDER MOITRA v. ABDUL SYAD.

Judgment.

FIELD, *J.*

dispute likely to induce a breach of the peace. When t
appear before the Magistrate, the law expressly require
the fact of actual possession be enquired into. But it
me that the essence and basis of the jurisdiction, whic
trate can exercise under Section 530, depends upon the
dispute likely to create a breach of the peace; and that
parties appear before the Magistrate, if they are able to
it otherwise appears to the Magistrate that there is no
no such dispute as is likely to induce a breach of the
Magistrate should hold his hand and not proceed further.

I take it that the term "dispute" in Section 5
reasonable dispute, a *bonâ fide* dispute, a dispute between p
have each some semblance of right or supposed right. I
decided by this Court in a case to be found in *Rai Mohun R*
16 W. R., Cr. 24 that, when a decree has been passed by a
regarding land in dispute, it is the duty of a Magistrate t
it; and he has no power again to institute proceedings reg
land under this Section of the Code of Criminal Proce
principle of this decision is this, that when the rights of
have been determined by a competent Court, the disp
end, and it is the duty of the Magistracy to maintain the
the successful party. In other words the defeated party
allowed to go to the Criminal Court, and alleging the ex
a dispute invoke the aid of the Magistrate and the police
lize the effect of the decree of a competent Civil Court,
rights of the parties have been determined there is n
"dispute" within the meaning of Section 530; and t
course for a Magistrate to pursue, if the defeated party d
that may probably occasion a breach of the peace, is to t
under Section 491 of the Code of Criminal Procedure a
from such person security to keep the peace.

In the case at *Rai Mohun Roy* v. *Wise*, 16 W.R., Cr. 2
tion of title had been definitively determined by the Civil
no case has, so far as I am aware, as yet arisen in which th
of that decision has been carried further or extended to case
there has been merely a summary adjudication upon the q
possession. I think, however, that the proceedings under th
gistration Act are proceedings to which the same principl

ended. Under this Act a Revenue officer is directed to hold an in-
ry; that enquiry in this particular instance was held in the presence
both parties; and they had an opportunity of producing before the
venue officer evidence to shew that they were in possession of the
d. After making his enquiry, the Revenue officer came to the
clusion that Gobind Chunder Moitra was in possession; his
me was registered in the Collector's General Register as that of
person in possession of the estate; and the result of this regis-
tion is, that the Meahs are not entitled to sue the tenants for
ts; for to any such suit it is a sufficient defence that their names
not registered in the Collector's General Register.

If after these formal proceedings before the Revenue authori-
it is competent to the Magistrate to take action under Section
, an order made under this Section may absolutely neutralize
effect of the Registration proceedings (as has happened in this
) and great confusion and possible injustice may be done. Per-
s who have had experience in the mofussil are well aware why
order under Section 530 is so strenuously sought after in many
es. Such an order is important as regards the question of limi-
ion. The person who is declared by the order of the Magistrate
be in possession under Section 530 can successfully set up such
session in answer to a plea of limitation.

The question of burden of proof, no unimportant question in
ny cases, depends materially upon whether a party occupies the
ition of a plaintiff or a defendant in a Civil suit, and the person
o succeeds in getting the Magistrate to declare him to be in
session, obtains no small vantage ground for subsequent litiga-
n. *Melior est conditio defendentis.*

Then whether a person who has a good title will be able to
cure witnesses to give evidence in his favour, depends in no
ht degree upon whether he is in possession or out of possession.
gard being had to these considerations, I think that Magistrates
uld be most careful in applying the provisions of Section 530;
t they should not proceed to act under this Section unless they
satisfied that a dispute, a *bonâ fide* dispute, a reasonable dispute,
spute in which there is some semblance of right on either side,
ts; and that such dispute is likely to induce a breach of the
ce. I am satisfied that it was not the intention of the Legisla-

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FIELD, *J.*

ture that the provisions of this Section should be applied to a case in which a competent Court, whether in a regular suit or that sort of proceeding which is in this country known as a sum mary proceeding, has decided that one person is entitled to, or is possession of land.

I may refer to Section 535 of the Code of Criminal Procedu by way of further argument in support of this view. This Secti enacts that "nothing in this Chapter shall affect the powers of Collector or a person exercising the power of a Collector or of Revenue Court." The officer acting under the Land Registrati Act is probably a Revenue Court; and if a Magistrate may und Section 530 of the Code of Criminal Procedure decide that a pers is in possession, whom a Revenue officer has under the provisio of the Land Registration Act held not to be in possession, t powers of such Revenue officer or Court would be materially affecte

It therefore appears to me that the order of the Deputy Magi trate should be set aside, (1) because the initiative proceeding the District Magistrate was defective, (2) because the whole of t proceedings were without jurisdiction.

1881.

JUGGERNAUTH KHAN v. J. E. MACLACHLAN.

Judgment.

the case of a contract without the words "on 7 days' notice" says that if that were the case they would have all Novem deliver.

What they contracted for was to deliver in November wit words "on 7 days' notice, &c.," in the contract.

The construction must depend on the intention of the con ing parties according to the well established rule, and the qu is what was that intention.

If the seller is to have the whole of November, those "on 7 days' notice" in the contract appear to have no mea The contract gave to the purchaser a right by notice to fix the delivery should begin.

That is a very reasonable and intelligible clause, for w merchant has to take a large delivery he must be prepared accommodation to store the goods in. This view is supported l conduct of the parties.

On the 5th November 1879, Mr. MacLachlan wrote t sellers and stated that he would be prepared to take deliv the 1000 bags of ginger within seven days from the date th He received no reply till the 11th when he wrote again, and fairly said that if the defendants considered the contract dif from what he, MacLachlan, contended for they should have that he, MacLachlan, was mistaken in his construction. Mr. B jee quoted *Coddington* v. *Paleologo*, L. R., 2 Ex., 193, and *Bel Gye*, L. R., 1 Q. B. D., 183. *Coddington's* case appears to me t the most bearing on the present case, but the words were not tical. The contract was for delivery between 17th April an May. The sellers made no delivery on the 17th April. Th day the purchaser rescinded the contract, and an action was b for non-acceptance and the Court of the Exchequer was The Chief Baron and Baron Parke took one view and thou the plaintiff was not bound to give delivery on the 17t Baron Bramwell thought that he ought to have commen very on the 17th. Baron Martin agreed, but the Chief B not go as far as Mr. Bonnerjee contends in this case whe that the contract was satisfied by the delivery of the whol between the 17th of April and the 18th of May inclusiv portions and at such intervals as a jury might think with the reference to the nature and effect of the whole

claims damages at 8-12, I think if I give him 7-12 he
is entitled to. The damages will be for 1,000 bags as
between 5-11 and 7-12 or 2-1 per maund. Each bag c
or 1 maund 14 seers and 10 chittacks.

Against the decree the defendants appealed—

Evans and *Bonnerjee*, for the Appellants.

Branson and *T. A. Apcar*, for the Respondent.

Evans: It was a condition precedent that th
should have given notice. If the words of the contr
notice by the buyers" simply, the Court would impor
notice. "On notice" means "after notice"—*Reg*
12 Q. B., 960, and "on 7 days' notice" means after 7
but under the contract the time for delivery is the
of November after such notice. See s. 55 of the Cont

[GARTH, *C. J.*:—Does not the contract mean tha
in November the buyer may give notice and that aft
tion of 7 days the seller is to deliver. Under the n
seems to me that the 13th was the day on which del
have begun.]

All the buyer says is that on and from such a da
to take delivery—Pollock on Contracts, pp. 143—4

[GARTH, *C. J.*:—Suppose no month was stip
delivery was to be on notice, is the seller not bou
notice?]

Yes, within a reasonable time, but here the
fixed—viz., the whole of November—*Coddington* v.
2 Exch., 193.

[PONTIFEX, *J.*:—"On notice" must be taken a

The notice given is not good. The notice
"within 7 days."

[GARTH, *C. J.*:—That point was not taken i
or in the correspondence or pleadings.]

From our point of view it is immaterial wh
good or bad, as we consider the defendant
of the month in which to make delivery.
Sale, 559.

The respondent was not called upon.

1881.

J. E. MACKENZIE EVANS.

buyers" are intended to give the buyers the right of fixing the particular time in November, at which the delivery was to take place. If this were not so, the words seem to me to have no meaning.

I think, therefore, that the defendants were bound to commence delivery on the 15th of November, and that the breach of contract occurred, when the sellers virtually refused to deliver until the 25th of the month.

It has also been suggested by Mr. Evans, that the 7 days' notice, which the plaintiff gave was insufficient, because it required the delivery to be made "*within 7 days*," instead of *at the expiration of 7 days* from the 5th November. But this is at best a mere formal objection; and I think it clear from the correspondence, that the defendant understood and treated the notice as a 7 days' notice under the contract. If the notice had not been given, the seller would not have been bound to deliver at all, but the defendant evidently considers himself bound by the notice to deliver according to what is the true meaning of the contract.

Moreover, this point as to the form of the notice was neither taken in the correspondence between the parties, nor in the written statement of the defendant, nor in the Court below, nor in the grounds of appeal to this Court.

The only other point, which has been made by the appellants, is, that the Judge in estimating the damages, has given the plaintiffs 2 annas a bag too much.

This is a small point, and Mr. Branson does not contest it. The damages therefore will be reduced by 2 annas a bag.

But as the appeal has substantially failed, it be will be dismissed with costs.

1881.

OSUNNO DOMAR TTERJEE v. EMPRESS.

Judgment.

once passed by the Magistrate and addressed to the "Naibs and "agents of both parties" setting forth that "in consequence of the "opposition of the parties there was an increasing ever present pro- "bability of an immediate disturbance leading to riots and affrays "between the partisans of one and the other. If any attempt be "made to collect rents, a notice to be issued to the Naibs and agents "of both parties to refrain from collecting rents till such time as "the right and title of both parties be established by order of a "competent Court." The order was headed as a proceeding under Section 518 Criminal Procedure Code.

If the course adopted is the legal one, then whenever a dispute arises and some one complains of violence offered to him or her individually rent collection is to be indiscriminately suspended, whether the complaint is well founded or the reverse. A claimant who has not a shadow of a title may thus put the rightful owner to great inconvenience and loss, and tenants who are willing to pay their rents must not be asked for them, and limitation may bar claims thus suspended.

We have no hesitation in saying that Section 518 was never intended to authorize an order of the sort now under consideration, and as we consider it was an order which the Magistrate had no power to pass we think the conviction for disobeying it cannot be supported.

We set aside the conviction and direct that the fines be refunded.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF BRAMANUND BHUTTACHARJEE, ... APPELLANT.

1881. *March 10th.*

No. 810 of 1880.

Penal Code Act, XLV of 1860 *Section* 211—*False Charge—Criminal Proceedings, Institution of—Suspicion, Statement to Police of.*

A statement made to the police of a suspicion that a particular person had committed an offence is not a "charge" within the meaning of Section 211 of the Indian Penal Code, nor does it amount to the institution of a criminal proceeding, and the person making the statement cannot, on the suspicion being proved to be unfounded, be convicted under that Section.

THE facts of the case as disclosed in the evidence were as follows:—The prisoner laid a complaint at the thannah stating that a dacoity had been committed in his house by a gang of 30 or 35 persons whom he was unable to recognise in the dark, and then added, "*Mohesh Roy was one of the dacoits. I suspect him because he is my enemy.*" Thereupon the police held an investigation, in the course of which the house of Mohesh Roy was searched. The prisoner there identified a brass lota as part of the stolen property. this lota, however, was claimed by Mohesh Roy as his own, and was afterwards found by the Sessions Judge to be really his. It was also in evidence that 3 days after the first information the prisoner pointed out to an Inspector of Police the broken staple of a door in his house in proof of the dacoity, although according to the testimony of another police officer, it had been previously examined and found to be uninjured. The police eventually reported that the complaint was false and the Magistrate of the district having accepted that view of the case ordered a prosecution under Section 211 of the Indian Penal Code which resulted in the conviction of the appellant.

L. Ghose and Baboo *Boido Nath Dutt,* for the Appellant.

L. Ghose:—The conviction is bad. The prisoner had no opportunity of proving his case before the Magistrate. It has

1881.

IN THE MATTER OF PETITIONER.

Judgment.

been repeatedly held by this Court that a conviction under this 211 is illegal where the accused has not had such an opport *Reg.* v. *Hem Lall Ghose*, 13 W. R., Cr. 37; *Reg.* v. *Gour I Sirji*, 16 W. R., Cr. 44; *Sreenath Mundle* v. *Sreeram Rajp* W. R., Cr. 62; *Syed Nasir Hossein* v. *Ram Golam Singh*, 25 Cr. 10; *In the matter of Choolhie Telee* 2 Cal. L. R., 315, *In the matter of Gunga Singh*, 2 Cal. L. R., 389; *Nusibunnissa* v. *Sheikh Enat Ali*, 4 Cal. L. R., 413 and 534; *In the ma Kanhi Lall Miter*, 7 Cal. L. R., 382.

MITTER, *J.*:—But in all these cases there was a com before the Magistrate. In this case the prisoner did not foll his information to the police by a complaint before the Magis

It is submitted that the distinction does not explain the A false charge before the police and a false complaint bef Magistrate are distinct offences, and the one is not merged other. Therefore, if the distinction is sound, the conviction the cases cited might have been upheld as regards the false before the police irrespective of the proceedings before the trate. There is only one case, *Ashraf Ali* v. *Empress*, I. 5 Cal., 281 in which this distinction is expressly drawn. Bu very recent case, *Empress* v. *Karimdad*, 7 Cal. L. R., 4 distinction was not recognised.

The conviction is also bad in as much as the prisoner d make a charge or institute proceedings against Mohesh Roy the meaning of Sec. 211 of the Indian Penal Code. He only his suspicion which ought to have been taken for what it was

[PONTIFEX, *J.*:—According to that argument any per protect himself from future consequences by saying "I su and so."]

The aggrieved party might have brought an action for but there can be no proceedings under Section 211 until is actually made. Here the prisoner only stated his suspi

[PONTIFEX, *J.*:—The police acted upon that state searched Mohesh Roy's house and the prisoner was pres the search.]

The police were not bound to act upon the mere the prisoner. If they chose to act upon it, they did so o

1881.

In re BRAMANUND BHUTTACHARJEE.

Judgment.

responsibility. When Mohesh Roy's house was searched the prisoner was bound to be present.

[PONTIFEX, *J.*:—But there was false identification of property and fabrication of false evidence.]

Even in true cases there is very often exaggeration and even fabrication of evidence. But the question is, did the prisoner charge' Mohesh Roy within the meaning of Section 211 ?

[MACLEAN, *J.*:—The Section is not limited to cases when a charge is actually made. The words of the Section are wider.]

The words are "whoever institutes or causes to be instituted any criminal proceeding, or falsely charges" &c. The mere statement of one's suspicion does not amount to the institution of a criminal proceeding. Such a statement may be worthless and the police ought not to have searched Mohesh Roy's house in the absence of more substantial grounds.

[PONTIFEX, *J.*:—If the statement of the prisoner was not *bonâ fide* he ought to be responsible.]

If the statement was not *bonâ fide* the prisoner might have been proceeded against for defamation or slander. But as he did not make a charge or institute a criminal proceeding, he ought not to be held responsible for the proceedings of the police who acted on a statement on which they ought not to have acted. There may be other remedies, but it is submitted the conviction under Section 211 is bad in law.

The Court (1) having taken time to consider, delivered the following judgments on the 10th March 1881 :—

PONTIFEX, *J.*:—As the learned Judges who heard the appeal are of opinion that a dacoity was actually committed, but differ with respect to the conviction of the appellant for falsely charging Mohesh Roy with the offence, I have directed my judgment as to the latter point only.

If a dacoity was committed I am of opinion that the appellant ought to be acquitted, because the manner in which he mentioned the name of Mohesh Roy to the police would not thus amount to a false charge. It would amount only to providing the police with a possible clue for investigating the matter which they might or might not follow up as they considered fit.

(1) PONTIFEX, MITTER and MACLEAN, *JJ.*

1881.

In re BRAMANUND BHATTACHARJEE.

Judgment.

Under these circumstances I think the accused shou acquitted.

MITTER, *J.*:—I am also of the same opinion. It seems that the finding of the Judge that there was no dacoity in the of the appellant is not warranted by the evidence. On the hand the evidence to my mind is sufficient to support the conc that the appellant's statement upon this point though exagg was not wholly without any foundation in truth. If therefor was a dacoity, the evidence in my opinion is not sufficient to that the appellant falsely accused Mohesh Roy *knowing* tha was no just ground for the accusation. The appellant will fore be acquitted and discharged.

[CRIMINAL JURISDICTION.]

1881. *Feb.* 15*th.*

No. 23 of 1881.

IN THE MATTER OF JUGGERNATH SAHAI AND ANOTHER, ... APPEL

Penal Code Act XL of 1860, *Secs.* 191 *and* 193—*False Eviden before a Police Officer.—Enquiry, Preliminary—Criminal dure Code, Act X of* 1879, *Sec.* 119.

Persons giving false answers to questions put by a polic conducting an enquiry preliminary to a proceeding before of Justice may be convicted of giving false evidence under 191 and 193 of the Indian Penal Code.

Reg. vs. *Nim Chand Mookerjee*, 20 W. R. Cr., 41 follo

MOTION to set aside a conviction and sentence passed Magistrate of Pachumba, and confirmed on appeal by the Commissioner of Chota Nagpore.

The petitioners in this case were convicted and sentenc Section 193 of the Indian Penal Code each to one year's imprisonment for giving false evidence before a police off

1881.

In re of JUGGERNATH SAHAI.

Judgment.

It appeared that in an enquiry which was being conducted by a police Inspector, they had in answer to questions put to them stated that certain property belonged to them, whereas the property in question did not in fact belong to them. They admitted that the statements made by them were false, but they alleged that they had been induced to make them by the threats of the police. They were unable however to substantiate this allegation.

The Judicial Commissioner was of opinion that in as much as the enquiry was preliminary to a proceeding before a Court of Justice the investigation was a judicial proceeding. He referred to *Reg.* v. *Soondur Putnaik*, 3 W. R. Cr., 59. He was further of opinion that the petitioners were, under Section 119 of the Criminal Procedure Code, bound to speak the truth and relying upon *Reg.* v. *Nim Chand Mookerjee*, 20 W. R. Cr., 41, he considered the conviction and sentence legal and proper.

The petitioners now sought to quash the conviction.

Baboo *Kali Kissen Sen*, for the Petitioners.

The judgment of the Court (1) was as follows :—

We consider that in this case the accused were bound to answer the questions put to them by the police, and that consequently, having given false answers, they committed an offence under Sections 191 and 193 of the Indian Penal Code.

We may observe that in this view we are supported by the ruling of Mr. JUSTICE MARKBY and Mr. JUSTICE BIRCH, in the case reported in 20 W. R. Cr. 41.

The application is rejected.

(1) CUNNINGHAM and PRINSEP, *JJ.*

[CIVIL APPELLATE JURISDICTION]

1880. *Aug.* 20*th.*

No. 142 of 1880.

KEDARNATH DOSS AND ANOTHER, (PLAINTIFFS)... APPELLANTS;

AND

PROTAB CHUNDER DOSS AND OTHERS (DEFENDANTS),..... RESPONDENTS.

Succession by collateral heir—Proof of title by person claiming as collateral heir.

Where a plaintiff brings a suit as a collateral heir, he is bound to allege and prove his title through the common ancestor in all its stages.

THIS was an appeal from a decree passed by Mr. Justice Broughton, on the 20th August 1880.

The judgment of Mr. Justice BROUGHTON was as follows:—

In this suit the plaintiff claims the property of Nobocoomar Dhara as the son of his paternal uncle's daughter. It was thought at one time that a paternal uncle's daughter's son would not be his heir, but it has been decided in the case of *Gurugobind Shaw Mandal* vs. *Anund Lall Ghose*, 5 B. L. R., (F. B.), 15, that he is an heir. If then the relationship has been made out the plaintiff would be entitled to recover.

At the close of the plaintiff's case I thought it very unsatisfactory, but, as there might be an appeal, I asked Mr. Mitter to go into a case but he declined to do so. On behalf of the plaintiff three witnesses have been called, the first of whom, the father-in-law of the plaintiff, was the medical attendant of the family of Nobocoomar Dhara. He, however, has been away from Calcutta for some years and speaks without the personal knowledge one would expect from a close relative. He is conducting the case for the plaintiff who does not himself come into Court. This is a matter for observation as he is capable of giving some evidence as to the family and must have known his uncle. The succession opened on the death of the widow of Nobocoomar Dhara on the

h 1879. On the 20th March, Mr. Zorab, acting for the plain- wrote a letter of demand in which he describes the plaintiff as n of Nobocoomar Dhara's sister, whereas if he had had proper ctions he would have known that the plaintiff had a brother live. The plaintiff's mother admits it and the other female s says so too. Another letter was afterwards written on the December by Mr. Moses the plaintiff's present solicitor. is vague, however, as to the relationship, and so is the plaint. I l not have laid much stress on the first letter describing the iff as the sister's son if the mistake had been corrected, but ubsequent letter and the plaint are equally vague. The iff's father-in-law who takes a great interest in the case care- keeps out of sight of the other brother. He is certainly an sted witness, and I give very little credit to parts of his ice, as where he says that from his shop he heard Rammohun uncle. This was long ago and he recollects it, but is ignorant tters which occurred a week or so ago. He is not in a posi- to give very important evidence and he speaks to matters a witness could not well recollect. The two women speak to coomar Dhara having a father; one calls him Rajoo, the other hunder, the doctor calls him Rajeeh. None of the witnesses anything of the father of the three brothers and as to one of Rammohun, (whether the identical Rammohun is spoken ot) he is not shewn to be dead. Again as Mr. Mitter observes ohun had property, yet nothing is shewn as to how it de- . The defendant must therefore succeed and the suit be sed with costs on scale 2.

gainst this decision an appeal was preferred :—

onnerjee and *Trevelyan*, for the Appellants.

litter and *Lee*, for the Respondents.

he following judgments were delivered by the Appeal (1) :—

ARTH, *C. J.* :—I think that the judgment of the Court below be confirmed upon the single ground, that the plaintiff has ewn who is the common ancestor, through whom he claims the property in question from Nobocoomar Dhara. GARTH, *C. J.*

(1) GARTH, *C. J.*, and PONTIFEX, *J.*

1859.

KEDARNATH DOSS v. PARVATI CHUNDRA DOSS.

Judgment.

GARTH, C. J.

The case comes before us under rather peculiar circu
The original plaintiff, Kedarnath Doss, claimed as the sol
Nilcomar Dhara; but it turned out at the trial, th
plaintiff should make out his title to the property, his mo
witness Koylas Moni Dossee, would be entitled to a sh
Upon this it was objected by the defendant's Counsel,
name ought to be added as a co-plaintiff, and an order
by the Court to that effect, although the plaint does not s
have been amended.

The decree of the Court below being then given for t
dants with costs, the plaintiff Kedarnath did not pay t
consequently he has been made an insolvent by the defend
the Official Assignee has declined to proceed with the
behalf of the creditors. Koylas Moni Dossee is, ther
only appellant, and an objection was taken before us, tha
not appear upon the proceedings, that she was a party to t
the appeal should be dismissed. But we thought it right
circumstances to allow the argument to proceed, upon t
standing, that an amendment was to be made by the prop
in accordance with the order of the Court below.

We have, therefore, properly speaking, to consider
case of Koylas Moni Dossee; but as both plaintiffs cla
the same title, it will really be necessary to consider the w
as if Kedarnath had not become an insolvent.

The plaintiff, Kedarnath, claimed to be the heir of Ni
Dhara, as being the only surviving son of his paterna
daughter; but it turned out in the course of the case, th
a brother, who is now dead, and who, if he had lived, w
been his co-heir. This brother's share, if he had any w
have passed to his mother, Koylas Moni; and this is t
why she was ordered to be made a co-plaintiff.

Koylas Moni was herself called as a witness at the
if her story is to be believed, she proved the following
Rammohun, Ramjoy and Rambuddo were three brothers
Moni herself was the only daughter of Ramjoy, and h
and mother were both dead. Rammohun left no ch
and his wife are both dead;—but Rammohun's mother,
an old woman, is not proved to be dead—Rambuddo,

1880.

KEDARNATH DOSS v. PROTAB CHUNDER DOSS.

Judgment.

GARTH, *C. J.*

seem to have been known by other names was the father of Nobocoomar, who died without issue, and his wife is dead also.

Several points were raised in the Court below and pressed upon us here by the defendant's Counsel, with regard to the insufficiency of the evidence; but I would decide the appeal upon this one point only.

The common ancestor is of course alleged by the plaintiffs to have been the father of the three brothers; but it is not shown who or what he was, nor is even his name mentioned. No information whatever has been given to the Court respecting him, and no sufficient reason has been suggested, why such a material element in the case has been omitted. It is certainly very remarkable, that Koylas Moni, if her story be true, should not know who her father's father was; and it does not appear, that any steps have been taken to ascertain that fact.

It must be borne in mind, that the brothers would not have inherited directly from one another, but through their father; and that the father would, if alive, be entitled to the property in question before Ramjoy. In this respect the rule of Hindoo law is similar to the law of England, since the Statute 3 and 4 Will. IV C. 106, S. 5; and I believe that the rule of evidence there in cases like the present is correctly laid down in the last edition of Roscoe's Nisi Prius Evidence, p. 1010, that where the plaintiff claims as a collateral heir, he is bound to allege and prove his title through the common ancestor in all its stages;—and one most important stage is of course the common ancestor himself.

It is obviously only fair to the defendants, that this rule should be strictly observed because although Ramjoy, Rammohun, and Rambuddo may be said and believed by the witnesses to be three brothers, it is possible, that they may in fact be cousins or related in some other degree, or that their legitimacy may be doubtful, or that they may have other brothers, who if alive would take as heirs in priority to the plaintiffs.

I think, therefore, that upon this ground alone the appeal should be dismissed with costs on scale 2.

PONTIFEX, *J.*

PONTIFEX, *J.*:—I agree with BROUGHTON, *J.* in thinking the evidence untrustworthy and insufficient to entitle the plaintiff to a decree.

1880.

KEDARNATH DOSS v. PROTAB CHUNDER DOSS.

Judgment.

PONTIFEX, J.

It seems to me incredible that Koylas Moni should not l her grandfather's name. But it may have been material to press it, as it might have given the defendants a clue. I opinion the plaint ought to have stated the descent from a mon ancestor and the evidence ought to have supported statement.

Then the failure of the male plaintiff to present himsel witness is very gravely suspicious. According to the eviden the doctor, his father-in-law, Nobocoomar arranged his mar and acknowledged him as his nephew. But if this is true it have happened immediately before Nobocoomar's death, and necessary consequence must have been that the male plaintiff have performed Nobocoomar's shrad.

Now the evidence does not shew that he did perform the s and according to the evidence, defendants must have been a from living in the house, whether he did so or not. If h presented himself as a witness, the first question would have Did you perform the shrad or not—and if not, why not? It to me that he could not face this question, and not only do I the evidence is insufficient to give the plaintiffs a decree, but have a very grave suspicion that the whole case is untrue.

[CIVIL APPELLATE JURISDICTION.]

1881.
Jan. 27th and *Feb. 7th.*

No. 193 of 1880.

ABDOO FUTTAH (DEFENDANT), ... APPELL

AND

ZABUNNISSA KHATUN (PLAINTIFF),..... RESPON

Mahomedan Law—Maintenance of wife—Decree for mainte of wife.

In a suit by a Mahomedan woman against her husband fo tenance, the Court, where there has been no previous de mutual agreement for maintenance, can only direct mai from the date of the decree.

THIS was an appeal from a decree passed by Mr. JUSTICE on the 20th July 1880.

1881.

ABDOO FUTTAH v. ZABUNNISSA KHATUN.

Judgment.

The suit was instituted by a Mahomedan woman for dower nd maintenance. The judgment of the lower Court was as llows :—

"It is clear plaintiff is entitled to dower. I entirely disbelieve at an alteration has been made in the deed after it was executed, d the defendants story with regard to this. I am satisfied that e marriage was consummated. I therefore hold that the plaintiff entitled to the dower she claims. Her claim to interest on the wer has been abandoned. Plaintiff further claims maintenance up February 1878. It is quite clear that she has received maintenance up to a certain time.

"Plaintiff is therefore entitled to maintenance, but the question as to the amount. It is a difficult matter to fix the amount, she ates that she has been allowed at the rate of Rs. 100 a month, and reies on the correspondence that passed between her brother and her husband the defendant, I do not think that she can be entitled to such sum as of right. On the other hand the defendant's proposal to pay Rs. 10 or 12 a month is monstrous. Upon the materials before e I think that Rs. 50 a month is a proper sum to be allowed to r for her maintenance."

The decree directed the payment of past maintenance.

Against that decree the defendant appealed.

Piffard, for the Appellant.

Bonnerjee, for the Respondent.

The judgment of the Court of Appeal (1) was as follows :—

The only material question, which we are called upon to decide his appeal, is as to the maintenance. The plaintiff's right to dower is hardly disputed.

Mr. Piffard certainly contended in the first place, that the endant was placed at a great disadvantage at the trial, in conence of being obliged to conduct his own case; and urged that Court should allow him a new trial upon payment of costs. there is clearly no ground for this contention. The defendant never applied for a new trial in the Court below, and any disantage under which he has laboured, is due to his own default.

With regard to the question of maintenance Mr. Piffard does

(1) GARTH, *C. J.*, and PONTIFEX, *J.*

1881.

ABDOO FUTTAH v. ZABUNNISSA KHATUN.

Judgment.

not object to the amount of the monthly allowance, but he contends that the decree is erroneous in two respects :—

1st. That no order ought to have been made for past maintenance; and

2nd. That it should have been made payable, not during the plaintiff's natural life, but only during the continuance of the marriage.

As the defendant conducted his own case at the trial it would appear that the attention of the learned Judge was never called to either of these points; but upon reference to the authorities, we think Mr. Piffard's contention is well founded.

As to the 1st point, the law is stated thus in Baillie's Digest 413: "When a woman sues her husband for maintenance, for a time "antecedent to any order of the Judge, or mutual agreement of the "parties, the Judge is not to decree maintenance for the past;" and the same rule is laid down in much the same terms in the Hedaya Vol. I., p. 398, and quoted in the Tagore Law Lectures for 1878 p. 453.

We think, therefore, that as in this case no decree or agreement for maintenance was made before this suit, the maintenance should have been made payable only from the date of the decree.

We think it also quite clear, that maintenance can only be payable during the continuance of the marriage.

The decree will therefore be modified accordingly, and as the appellant has partially succeeded, we think that each party should pay their own costs of this appeal.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF KALI KRISHTO THAKUR

AND

GOLAM ALI CHOWDHRY ..... APPELLANT.

1881.
March 23rd.

No. 61 of 1881.

Criminal Procedure Code, Act X of 1872 *Section* 530—*Proceeding to be recorded under Section* 530 *of Act X of* 1872—*Police Report, Incorporation of, in proceeding recorded by Magistrate—Possession —Title, how far evidence of Possession.*

Where action was taken under section 530 of the Criminal Procedure Code, the Magistrate recorded the following statement "whereas from the police report a breach of the peace is probable," as the ground of his proceeding under that section.

Held, that the proceeding thus recorded by the Magistrate was not in itself a sufficient compliance with the requirements of the section which requires that the proceeding shall state that the Magistrate is satisfied that a dispute likely to induce a breach of the peace existed, and the ground upon which he is so satisfied, but that the police report referred to might be incorporated to show that a dispute likely to induce a breach of the peace existed, and that there were grounds upon which the Magistrate might reasonably be satisfied.

Where there has been substantial evidence of possession or a conflict of evidence on that question the Magistrate is justified in looking to the evidence of title in corroboration of the evidence of title.

RULE to show cause why an order passed by the Deputy Magistrate of Muduripore in Furridpore, under Section 530 of Act X of 1872 should not be set aside. The circumstances under which the rule was obtained, and the grounds upon which the order in question was sought to be set aside will be found in the judgments of the Court.

M. Ghose, Baboo *Doorga Mohun Dass*, Baboo *Kalimohun Dass* and Baboo *Ram Sukhu Ghose*, for the Petitioners.

H. Bell and Baboo *Seetanath Ghose* showed cause.

1881.

In re of KALI KRISHTO THAKUR v. GOLAM ALI CHOWDHRY.

Judgment.

FIELD, *J.*

The following judgments were delivered by the Court (1) :—

FIELD, *J.* :—This is a case under section 530 of the C Criminal Procedure. The land in dispute is a piece of formed chur land. It was claimed by one party as belong his estate Jahazmara, and by the other party as belonging mehal Punchkata. This rule was obtained substantially o grounds : *first*, that the preliminary proceeding of the Mag was defective ; *secondly*, that the order made by the Magist bad in as much as it does not contain a sufficient descripti boundaries, so as to enable the land in respect of which th has been made to be identified ; and *thirdly*, that the Mag allowed his mind to dwell, not upon the question of possessio on the question of title ; and that he had not evidence of pos before him which could justify him in making the order.

As to the first of these points, the learned Counsel f petitioner relied on the case of *Sheikh Munglo* v. *Durga N Nag*, 25 W. R. Cr. R., 75. In that case no proceeding wh was recorded by the Magistrate who initiated the proceedings section 530 of the Code of Criminal Procedure. There was n an order endorsed on the back of the police report, which ord in these terms : " Serve a notice on Durga Churn to at once from building the hut under section 518 Criminal Procedure and call on both parties to appear before me this day week their documents, that I may determine under section 530 Cri Procedure Code who is in possession of the disputed land."

Now, in the case at present before us there is a proce The Magistrate has recorded the following words : " Whereas the police report a breach of the peace *(sic.)* probable."

It would seem that some such word as " is" or " appear been omitted. In a case (see *Gorind Chunder Moitra* v. *Syad*, *ante*, p. 217) which was before this Bench a few ago I expressed an opinion that it is the duty of the Magi before taking proceedings under section 530, to record a pr ing, stating in the first place, that he is satisfied that a c likely to induce a breach of the peace exists ; and in the place, the ground upon which he is so satisfied ; and these o

(1) PONTIFEX and FIELD, *JJ.*

1881.

In re of KALI KRISHTO THAKUR v. GOLAM ALI CHOWDHRY.

Judgment.

FIELD, *J.*

ıve been now pressed before me. I certainly think that it duty of a Magistrate to record distinctly in cases under 530 that which the law requires to be recorded. But · the omission on the part of a Magistrate to comply pre- ith the requirements of the law will in every case afford a t ground for setting aside his order is another matter. In which was recently before this Bench a reference was made Magistrate's proceedings, to the police report and I ex- an opinion that, even if the police report were taken to be ated by reference in the initial proceeding there would not er sufficient to satisfy the requirements of the law. In the case, the Magistrate's proceeding, by itself, is not a sufficient nce with the requirements of the law; but if the police to which this proceeding refers be taken to be incorporated, sufficient, *first*, to show that a dispute likely to induce a of the peace existed, and, *secondly*, to shew grounds upon he Magistrate might reasonably be so satisfied. I am dis- of opinion that a Magistrate who records a proceeding like ich has been recorded in the present case performs his duty rfunctory and unsatisfactory manner, but I am not prepared hat the final order in the present case is defective, on the that the initial proceeding did not contain within itself all he law requires to be recorded, but that we have to look to ice report in order to find matter sufficient to satisfy the nents of the section. On this first ground then it appears hat the objection taken by the learned Counsel must fail. the *second* ground, that, namely, connected with the bound- ere is, in all probability, a sufficient description, regard being he nature of the land which formed the subject of dispute the difficulty of giving precise boundaries of chur land; but necessary to go further into this question, because the order Magistrate ought in my opinion to be set aside on the ng ground, which I am about to deal with. This ground is re was not evidence of possession before the Deputy Magis- justify his order; that he has allowed his mind to wander om the question of possession which it was his duty to te upon; and that his order is based entirely upon the view e has taken with respect to title.

1881.

KALI KRISHTO THAKUR v. GOLAM ALI CHOWDHRY.

FIELD, J.

I have read through the evidence of the witnesses examin
behalf of the petitioner before the Magistrate, and it appears t
that this rule ought to be made absolute upon the grounds so t
Section 530 of the Code of Criminal Procedure enacts that
Magistrate shall, without reference to the merits of the clai
any party to the right of possession proceed to enquire and d
which party is in possession of the subject of dispute. Now i
been contended before us that the proper meaning to be placed
these words is, that the Magistrate is entirely precluded from r
ing any evidence whatever as to the title of the parties. In
argument I do not concur. That possession should follow t
a reasonable and natural presumption; and if a Magistrate
case of this kind uses evidence of title, merely in order to guid
assist his mind in coming to a decision upon the question of
session, it appears to me that he is not transgressing the prov
just quoted by using evidence of title for this limited purpose
if instead of proceeding to decide as to the actual possessi
virtually puts aside the consideration of this question and
mines the question of title alone, then I think he is clearly
that which the law has forbidden him to do. In the presen
the Deputy Magistrate in the commencement of his judgmer
that the parties were called upon to shew their respective clai
it, ... the chur. He does not say that they were called u
shew their respective claims to possession. He then proce
enter into the question of title, to consider the circumstances
which the chur came into existence, and to give reason for thi
that this newly formed chur is part of the estate of one
rather than of the estate of the other party. Having dev
considerable portion of his judgment to the question of title h
proceeds to deal with the question of possession. He comm
this part of his judgment by saying. "Now to shew poss
Baboo Kali Krishto Thakur's men have examined several wit
one of whom is a Munsiff peon." He then deals with the ev
of the witnesses called to prove the distraint proceedings wh
believes to be fictions; and finally he says: "I lay not much
on the deposition of such witnesses. As the circumstance as
bability go in favor of Munshi Golam Ali and as (to?)
have stated in paragraph two of this decision, the disputed la

Jahazmara and is adjoined to chur Punchkati and as I it is in Golam Ali's possession, I direct that the disputed ould remain in Munshi Golam Ali's possession till otherwise by competent Court." Here the Deputy Magistrate ex- states that he does not lay much stress upon the testimony witnesses; and if we put aside this oral evidence, the other e before him is concerned mainly or indeed altogether with stion of title. It is therefore clear that apart from the oral e upon which he did not lay much stress, there was not e upon which the Deputy Magistrate could determine the n of actual possession, for evidence of title though it may ent and support direct evidence of possession cannot, stand- ne, be proof of possession. If the oral testimony of the es went to shew that the possession was with Golam Ali, he circumstances and probabilities of the case and the evi- f title had been used merely to corroborate this testimony ould be sufficient on the record to support the order of the Magistrate; but on examining this oral evidence I find s mainly directed to the question of title and contains little ing upon the question of possession. On the whole it is m the matter upon which the witnesses were examined, and e Deputy Magistrate's judgment that he did not properly his mind to the question which it was his duty to try, of actual possession, but did that very thing which by the ns of section 530 he was precluded from doing, namely, ded the case with reference to the merits of the claims of ies to the *right* of possession.

s being so, it appears to me, the Deputy Magistrate's order ction 530 of the Code of Criminal Procedure must be set

s Rule will be made absolute.

TTIPEX, *J.*:—I also agree that the proceedings must be set d after the judgment of my learned brother, it is only for me to say that in my opinion there was a sufficient ng recorded for the purpose of initiating proceedings under 30 of the Code of Criminal Procedure. I also wish to add ere had been substantial evidence of possession or a con-

1881.

In re of KALI KRISHTO THAKUR v. GOLAM ALI CHOWDHRY.

Judgment.

PONTIFEX, *J.*

flict of evidence on that question, the Magistrate would have been justified in looking to the evidence of title in corroboration of evidence of possession. But as my learned brother has read the depositions of the witnesses, and it does not appear that there is sufficient evidence of possession, I agree that the case should have been decided upon evidence of title alone.

[CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF RAM CHUNDER SHAW AND OTHERS, ... APPELLA

1881. *Jan. 15th.*

No. 705 of 1881.

Act VII (B. C.) of 1878, *Sections* 9, 58, *and* 74—"*Like offence*" *section* 74 *of Act VII (B. C.) of* 1878—*Presidency Magistr Act, IV of* 1875, *Section* 12—*Previous conviction under Excis*

To constitute an offence under section 58 of Act VII (B.C. 1878, it is necessary that the accused should, without a special li from the Collector, have introduced or attempted to introdu sale spirituous liquors manufactured at another place within which have been fixed under section 9 of the Act, for the con tion of liquors manufactured at a distillery established within limits.

The words "like offence" in section 74 mean any offence the Act, punishable with a fine of Rs. 200 or upwards—not sarily the "same offence.'.

APPEAL from a decision passed by one of the Presidency trates of Calcutta:—

Allen, for the Appellants.

Phillips, (Standing Counsel) for the Crown.

The facts and arguments appear from the following ju of the High Court (1) which was delivered by

(1) MORRIS and PRINSEP, *JJ.*

1881.

In re of RAM CHUNDER SHAW.

Judgment.

PRINSEP, *J.*

PRINSEP, *J.*:—The three appellants before us, as well as two others, have been convicted and sentenced under section 58 of the Bengal Excise Act, VII (B.C.) of 1878, and in addition to the penalty prescribed thereby they have, under section 74, been sentenced to imprisonment in consequence of their having been previously convicted of an offence under the Act punishable with a fine of Rs. 200 or upwards.

The Presidency Magistrate has recorded on the proceedings of the trial that he has "not the least doubt that the defendants (with the exception of Husnoo, who has been discharged) did introduce spirituous liquors without a pass, and have committed an offence under section 58 of the Excise Act."

To constitute an offence under the latter part of section 58, it is necessary that the offender shall have introduced, or attempted to introduce for sale spirituous liquors manufactured at another place into the limits fixed for the consumption of such liquors manufactured at such distillery (*i. e.*, a distillery established under section 9) without a special pass from the Collector.

In the present case we find that there is some evidence, which apparently the Magistrate has believed, to show that the liquor seized in Calcutta had been manufactured in Tollygunge, a suburb. Under the circumstances it is not necessary for us to express any opinion on the value of that evidence. But Mr. R. Allen, for the appellants, has maintained, and the Standing Counsel for Government who appeared to support the conviction, has ultimately admitted, that the Collector of Calcutta up to the present time has not under section 9 fixed limits with regard to any distillery in Calcutta within which no spirituous liquor manufactured after native processes, except in that particular distillery, shall be introduced or sold without a special pass. There cannot therefore be the special protection necessary to constitute an offence under section 58, and the conviction and sentences passed on the appellants must accordingly be set aside.

Two other persons have been convicted simultaneously with the appellants who have not been able to appeal, their sentences not being appealable; we have already held that no offence has been committed, and we therefore feel bound to deal with their cases under section 147 of the High Court Criminal Procedure Act. The Standing Counsel on behalf of Government consents to our proceed-

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In re of RAM CHUNDER SHAW.

Judgment.

PRINSEP, *J.*

ing summarily with this matter without complying with the spe procedure provided by section 181 of the Presidency Magistra Act, and as this would necessitate a mere compliance with fo without any possible advantage, we direct that the convictions sentences passed on these two men, Obinash Chunder Shaw a Baneshur Shaw, be set aside. The fines if paid will be refund and the appellants will be released from jail.

It is right that we should notice two objections taken in t appeal to the legality of the sentences passed. Mr. Allen first co tended that in order to render an offender under the Bengal Exc Act liable to additional punishment under section 74 it is necessa that he should have been previously convicted of the *same* offence the words "*like offence*" being synonymous with *same offence.* I appears to us, however, that the section contemplates merely th the offender, having been already convicted of an offence punishab with fine of Rs. 200 or upwards, should be again convicted of anoth offence punishable with the same punishment, and that this is t correct interpretation to be put on the term *like offence.* The ad tional sentence of imprionment passed under section 74 would not illegal if, in the case now before us, an offence had been establis under section 58.

The other objection is, that the alternative sentence of impris ment, viz., three months' rigorous imprisonment in default of p ment of the line imposed, is beyond what the Magistrate can im under section 12 of the Presidency Magistrates' Act, IV of 18 Mr. Allen contends that as under section 74 of the Bengal Ex Act the appellants were liable to imprisonment for a term exceeding 6 months, the Magistrate under section 12 of the Pr dency Magistrates' Act could not sentence them to undergo impri ment for more than six weeks, *i. e.*, one fourth of six months default of payment of the fine imposed.

It appears to us, however, that the appellants have been tenced practically to two sentences—one under section 58 to fi rupees one hundred each, in default to undergo three months' s rous imprisonment each, and the other under section 74, in addi to the penalty under section 58, to imprisonment each for six mon The imposition of the additional sentence would not affect

1881.

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Judgment.

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gistrate's power as regards the original sentence under section

It cannot be denied that standing by itself the sentence under ion 58 is perfectly legal, but it is contended that by reason of additional sentence of imprisonments under section 74 the term imprisonment in default of payment of the fine imposed under ion 58 is excessive, and therefore illegal. We see no valid reason this contention, and indeed it would be an anomaly if a sentence fectly legal under section 58 should become otherwise because the nder had rendered himself liable to an *additional* punishment account of a previous conviction under the Bengal Excise Act.

We observe that this case was heard by the Magistrate on the , 9th, and 16th November, though it was of a nature which ould ordinarily have permitted of its decision at the first hearing. reason is assigned for the postponements, nor is it stated that y were owing to the absence of the necessary evidence for the osecution. We think it necessary to notice this because frequent stponements add considerably to the expense incurred by the rties, and should be avoided.

We observe also that in the affidavit it is stated on behalf of pellant that application was made to the Magistrate for copies the evidence in this case; but the same was refused notwithnding the terms of section 170 of the Presidency Magistrates' t.

[CRIMINAL REFERENCE.]

1881 MUNI CHUNDRA .....
March 24.
AND
HARIRAM AHOM .....

Act XIII of 1859, Section 2—Artificer—Workman—Labourer.

A mahout or elephant driver does not come within the provision of Act XIII of 1859.

REFERENCE submitted by the Deputy Commissioner of Sibsagar Assam, dated the 21st March 1881.

The circumstances were as follows:—

A complaint was made under section 2 of Act XIII of 1859 against a mahout on the ground that he had entered into a contract with the complainant to serve him for three years as an elephant mahout.

The Assistant Commissioner exercising powers of a Magistrate of the 1st class, and who has been especially empowered to try cases under Act XIII of 1859, convicted the accused under Section 2 of that Act, and in default of finding security, sentenced him to six weeks' rigorous imprisionment.

The Deputy Commissioner was of opinion that the accused in this case was a domestic servant, and that, therefore, he should not have been tried under Act XIII of 1859, and upon this ground he considered the order of the Lower Court should be set aside.

He relied on the case of *In the matter of Domestic Servant*, 3 B. L. R., App. Cr., 32.

The opinion of the High Court (1) upon the reference was as follows:—

We think, with the Deputy Commissioner, that a mahout or elephant driver does not come within the provisions of Act XIII of 1859.

We set aside the order purporting to have been made under the provisions of that Act, and direct the release of Hariram Ahom.

(1) PONTIFEX and FIELD, *JJ.*

[CRIMINAL JURISDICTION.]

1881.
Jan. 16th.

No. T. b. 1.

IN THE MATTER OF THE EMPRESS, ...

AND

SALIK ROY, ...

Penal Code Act, XLV of 1880, *Section* 211—*False Charge before Police—Complaint before Magistrate—Police Reports—Procedure.*

Where a charge made to the police is found by that body to be false, there being no complaint made to the Magistrate, it is not necessary before a prosecution under section 211 of the Indian Penal Code can legally be instituted against the person making the charge, that the charge should be first judicially investigated.

Empress v. *Abdul Husan*, I. L. R., 1 All. 497 followed.

In the matter of Biyogi Bhagut, 4 C. L. R., 134 distinguished.

REFERENCE submitted by the Officiating Sessions Judge of Sarun on the 18th December 1880 under the following circumstances :—

Salik Roy, it appears, sent information to the police through the chowkidar, charging certain persons with setting fire to his house, and he repeated the charge to the police officer who went to his village to investigate the case. In the end the police reported the case to be a false one. The Magistrate at once directed the prosecution of Salik Roy for giving false information, without calling upon him or giving him any opportunity to prove his case. Salik Roy was thereupon committed to the Court of Session for trial under the provisions of section 211 of the Indian Penal Code for knowingly instituting a false charge with intent to injure the persons whom he accused.

The Sessions Judge was of opinion that the commitment was illegal; and he accordingly forwarded the record to be laid before the Court in order that the commitment may be quashed.

1881.

In re of EMPRESS v. SALIK ROY.

Judgment.

The judgment of the High Court (1) was as follows :—

This is a reference from the Judge of Sarun, asking us quash a commitment. The ground upon which we are asked to so is, that the accused who is charged with an offence under se tion 211 of the Penal Code, should not have been committed f trial until the complaint which he made had been judicially e quired into, and the Judge refers to a case decided by this Cou which he considers applies to the present case.

If the case referred to by the Sessions Judge is the case o *Biyogi Bhagut* convicted by his predecessor on 30th December 187 reported, 4 C. L. R., 134, we may point out that it is not in all respects similar to the present case. In that case, the complainant dissatisfied with the police investigation and report, made a complaint to the Magistrate which was dismissed without hearing his witnesses.

We do not find in the record that there was any complaint made to the Magistrate in this case, but on the report of the police that the case was false, the prosecution of the complainant was set on foot.

We are unable to say that there is anything illegal in th proceedings, and we are supported in this view by the case o *Empress* v. *Abul Husan*, I. L. R., I Allahabad, 497. We are no aware of any recent ruling of this Court of a contrary tenor.

We must, therefore, refuse to quash the commitment on th ground on which the Judge's recommendation is based.

(1) MITTER and MACLEAN, *JJ.*

[CIVIL APPELLATE JURISDICTION.]

LMONI SINGH DEO (PLAINTIFF) ..... APPELLANT;

AND

RA LAL DAS (DEFENDANT) ..... RESPONDENT.

1881.
March 14th.

No. 2272 of 1879.

il Procedure Code Act, X of 1877, section 13—Ex-parte Decree, whether final—Final Decree.

An *ex-parte* decree is not final within the meaning of Explanation IV, section 13, of the Civil Procedure Code Act, X of 1877, so long as it is open to the Court on the application of the parties to modify it.

PPEAL from a decree passed by the Officiating Judicial Commissioner of Chota Nagpore, dated the 7th June 1879, affirming the ecree of the Deputy Collector of Manbhoom, dated the 23rd of anuary 1879.

This was a suit for arrears of rent for 1280, together with road-ss and interest.

The question at issue was the amount of the defendant's juma, e plaintiff alleging it to be Rs. 100-3-12½ and the defendant . 39-10.

The juma-wasil-baki papers shewed the rent at the rate claimed the defendant, but it did not appear that the defendant had ever id rent at that rate.

In support of his claim the plaintiff produced a certified copy an *ex-parte* decree passed against the defendant in a previous rent-it on the 28th May 1867.

The lower Courts held that this decree, of which the defendant ied all knowledge, was not conclusive evidence of the amount of juma—the Appellate Court referring to *Goya Pershad Aubustee Tarinee Kant Lahoree Chowdhry*, 23 W. R., 149, in support of opinion. No evidence was given of any proceedings having n taken to enforce the decree.

The Court of first instance dismissed the suit and its decree was rmed on appeal to the Judicial Commissioner.

[CIVIL APPELLATE JURISDICTION.]

1881.
March 10th.

Nos. 1434 to 1437 of 1879.

\LLIAN BANERJI AND ANOTHER (DEFENDANTS) APPELLANTS;

AND

ODHUSUDUN BANERJI (PLAINTIFF) ..... RESPONDENT.

rtition—Compensation for Expenditure by certain members of joint family on the joint estate.

In a suit for partition it appeared that the defendants who were members of a joint family had at their own expense enhanced the value of portion of the lands belonging to the joint estate.

Held, that the partition should proceed on the basis of each co-sharer having an equal share of similar lands, compensation being allowed to each co-sharer for any private expenditure from which it could be shown the value of the partible property had been increased—and that unless it could be shown that were other lands of similar description out of which the share of the plaintiff could be made up, the plaintiff was entitled, on paying compensation to the defendants, to portion of the lands, the value of which had been enhanced by the defendants.

APPEAL from a decree of the Judicial Commissioner of Chota agpore, dated 16th April 1879, modifying a decree of the Sudder loonsiff of Poorolea, dated 6th August 1878.

In this case the plaintiff, as joint proprietor with the defendants some waste land, sued the defendants for a partition of all the nds which he held jointly with defendants. He alleged that they d brought the land under cultivation, in spite of his remonstrance, d had refused to allow him to participate in its profits. The fendants denied that the lands were held jointly with the plaintiff, d stated that they formed part of lands which originally were nt, but were apportioned to them many years ago when the nily separated.

Both Courts found against defendants on the independent title up by them. The first Court, however, refused to allow the intiffs any part of the lands lately brought under cultivation by

1881

the defendants, directing their share to be made up from oth portions of the estate.

On appeal the Judicial Commissioner, holding that the defe dants by encroaching on the common lands, without the consent their co-sharer were trespassers, ordered the plaintiffs to get th legal shares of the "Nayabadi" lands as well as other kinds.

The defendants thereupon preferred this second appeal again the decision of the Judicial Commissioner.

Baboo *A[illegible] Nath Chatterji* and Baboo *Saroda Churn Mitt* for the Appellants.

Baboo *Troy[illegible] Nath Mitter*, for the Respondent.

The judgment of the High Court (1) (after stating the fac as above) was as follows:—

We think that, in the circumstances of this case the partiti ought to have proceeded on the basis of each co-sharer having equal share of similar lands, compensation being allowed to e co-sharer for any expenditure in labour or otherwise by which could be shown that the value of any portion of the partible p perty had been increased. If on the partition, it should prove th the lands, now occupied by the defendants, are not in excess of share to which they are entitled, and that there are other lands similar description, out of which the plaintiff's share could be perly made up, the defendants might equitably be left in the e ment of the portion of the estate which they reclaimed.

If there are not other lands of a like character sufficie make up the plaintiff's share, the portion necessary for this pu must be taken from the lands reclaimed by the defendant plaintiffs, in that case, paying to the defendants whatever sum shown that the plaintiffs have expended on its reclamation. plaintiffs are unwilling to take the land on these terms, these dants will be at liberty to keep it, on paying to the plaintiffs value of the plaintiff's share in it.

(1) CUNNINGHAM and PRINSEP, *JJ.*

[CIVIL APPELLATE JURISDICTION.]

)DUN MOHUN GHOSE HAZRA AND ANOTHER (DEFENDANTS) ..... APPELLANTS;

AND

RODA SONDORI DASIA (PLAINTIFF) ..... RESPONDENT.

1880. *Sept.* 13*th*.

No. 1621 of 1879.

ecution of decree—Jurisdiction—Certificate of non-satisfaction of decree, Objection to Jurisdiction of Court to grant—Estoppel.

Certain property having been sold in execution of a decree by a Court to which the decree had been transferred, a suit was brought to set aside the sale on the ground that the Court from which the transfer had been made had no jurisdiction to grant, as it did, a certificate of non-satisfaction.

It appeared that on execution being applied for in the Court to which the decree had been transferred, no objection to the jurisdiction had been raised.

Held, that the objection, assuming it to be valid, was taken too late, and the sale could not be set aside.

APPEAL from a decree passed by the District Judge of Beerbhoom, dated the 21st May 1879, modifying the decree of the Subordinate Judge of Sooree, dated the 28th February 1879.

Baboo *Mohinee Mohun Roy* and Baboo *Guru Dass Banerjee*, for the Appellants.

Baboo *Hurry Mohun Chuckerbutty*, for the Respondent.

The facts of the case are fully stated in the judgment of the High Court (1) which was as follows :—

This suit was brought to recover possession of 6 annas of Lot akri with mesne profits by reversal of the auction sale in execution a decree in which the defendant's decreeholders themselves became e purchasers. The sale was sought to be set aside on various rounds, but the Lower Appellate Court disagreeing with the first ourt, the judgment of which was against the plaintiff, reversed

(1) MITTER and MACLEAN, *JJ*.

1880.

MOONSHEE [illegible] HAZRA v. BOISTO SOORI DASSA.

Judgment.

the sale on the ground that the Court which effected the au sale had no jurisdiction in the matter. The defendants, appel before us, question the correctness of the decision of the Di Judge and contend that it is contrary to law.

The following are the facts which it is necessary to sta order to make the points raised before us intelligible.

The plaintiff's husband and his co-sharers held a Jote in I Khurdi under the defendants. A suit, No. 96 of 1873, was bro against the plaintiff and her co-sharers for arrears of rent in Moonsiff's Court of Rampore Haut, the village Mour Khu being then within the jurisdiction. An *ex parte* decree was obtai the plaintiff and her co-sharers not having appeared to defend the su

It appears that the Jote was subsequently relinquished and movable property of the debtors being found within the jurisdicti of the Court, the decree-holders applied to the Moonsiff of Ramp Haut in the year 1874 to attach and sell a particular immova property within its jurisdiction. On this application being m an application under Section 119 of Act VIII of 1859 was made set aside the *ex parte* decree. Their application being registe notice was served upon the decree-holders. But on the date f for hearing, the applicants not having again appeared either person or through a pleader, the application was rejected. T application was made some time before the month of October 18 but was finally disposed of in the month of November follow In the meantime the jurisdiction of the Moonsiff's Court of R pore Haut was altered by a Government notification. It was n subordinate to the District Court of Murshedabad with a local j diction somewhat altered. According to this notification M Kurdi was excluded from its jurisdiction and remained part of district of Beerbhoom. The effect of this change was to di the original local jurisdiction of the former Moonsiff's Cou Rampore Haut into two parts, one of which continued attache the district of Beerbhoom, for which it was intended to create a Moonsiff's Court. Until that Court was formally created, High Court, evidently acting under Section 9 of Act VI of 1 on the recommendation of the District Judge authorized hin receive all original suits with power to transfer them either t Moonsiff of Sooree or Bolpore.

1880.

MODUNMOHUN GHOSE HAZRA v. BORODA SONDORI DASIA.

Judgment.

While this arrangement was in force, the decreeholders in the ar 1875 again applied to execute the decree No. 96 of 1873 and r the attachment and sale of the same property against which ey had proceeded in the previous year. This application was ade to the District Judge who referred it to the Moonsiff of Bole- ore. On the property being attached, the co-sharers of the plain- ff made various objections to the proceedings and the plaintiff ade an application under Section 119 of Act VIII of 1859 to set side the *ex parte* decree. These applications were unsucessful. t may be mentioned here that in these applications, neither the laintiff nor her co-sharers took any objection on the score of the Moonsiff of Bolepore having no jurisdiction to execute the decree. he attached property was brought to sale and the decree was par- ially satisfied.

The property now in dispute being within the local jurisdiction f the Moonsiff of Doobrajpore, the decree-holders obtained a certi- icate of non-satisfaction from the Moonsiff of Bolepore, and execu- ing the decree in the Moonsiff's Court of Doobrajpore caused the roperty to be sold. During the course of these proceedings no bjection was taken by the plaintiff or her co-sharers on the ground hat the Moonsiff of Doobrajpore had no jurisdiction to proceed in he matter.

The property was brought to sale and purchased by the defen- lants. The plaintiff then brought this suit to recover her share in , viz., six annas, on various grounds.

The suit was dismissed by the Subordinate Judge, but on ppeal the District Judge being of opinion that the Moonsiff of olepore had no jurisdiction to grant a certificate of non-satisfaction hich was the foundation of the proceedings in the Moonsiff's ourt of Doobrajpore, has awarded a decree in favor of the plaintiff y setting aside the auction sale.

We are of opinion that the decision of the District Judge is roneous. It is clear that the Moonsiff of Doobrajpore had juris- ction to cause this property to be sold in execution of a valid ecree.

There is no question that the decree was properly obtained. nder these circumstances assuming that the Moonsiff of Bolepore d no power under Act VIII of 1859 to grant a certificate of non-

CIVIL APPEAL.

1880.

MOHUNMOHUN GHOSE v. HAZRA BOROOA and NONDOOLAL DABIA.

Judgment.

ngement was in force, the decreeholders in the
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51.
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1880.

MODUNMOHUN GHOSE HAZRA v. BORODA SONDORI DASIA.

Judgment.

satisfaction, the sale should not be held void. As already s the plaintiff or her co-sharers never questioned either the pow the Bolepore or the Doobrajpore Court to proceed with the e tion case. They cannot now be permitted to reply upor circumstance that the transfer of the decree was not pro obtained, in order to annul all the proceedings held in exec of the decree. It has been contended that the consent of pa cannot confer jurisdiction. But in this case it is indisputable the Moonsiff's Court of Doobrajpore had jurisdiction to sell property in execution of a valid decree. The objection taken is that there was no jurisdiction on the part of the Court which ed ted the sale, but that the preliminary proceedings by which decree was brought to the Doobrajpore Court were not strie regular. But we think that it is too late for the plaintiff to t this objection now.

We have been hitherto considering the question raised b us assuming in favor of the respondent that the aforesaid pre nary proceedings were not regular. But this point is far from c

The effect of the local jurisdiction of the former Ram Haut Moonsiff's Court being divided, was to create two Moon Courts in the place of one. It is only an accident that one of t continued to be called Rampore Haut Moonsiff's Court. I two new Courts (in point of fact both of them were new) been called by two different names; there would not have bee doubt that that Court to which Mour Khurdi was assigned have been the Court to execute the decree. But in the year when the decreeholders made their second application to e it, no Moonsiff had been appointed to that Court. The High and the District Judge were of opinion that the office was under section 6 of the Bengal Civil Courts Act. The ex application having been made over to the then Moonsiff of B by the District Judge, it may be reasonably held that for th poses of this particular case the former was appointed by th to the vacant post under section 8 of that Act. If this view action of the District Judge in making over the application decree to the Moonsiff of Bolepore be correct, then all th quent proceedings are clearly in accordance with the pro Act VIII of 1859.

1880.

MADUNMOHAN GHOSE HAZARA. v. BORODA SONDARI DASI.

Judgment.

On the whole we are of opinion that the auction sale of the sputed property held by the Moonsiff of Doobrajpore should not set aside.

We accordingly reverse the decree of the Lower Appellate ourt and restore that of the Moonsiff with costs in all the Courts.

[CRIMINAL JURISDICTION.]

MPRESS, ...

AND

HIBO BEHARA, ...

1881.
Jan. 20*th.*

No. 121 of 1880.

enal Code Act, XLV of 1860, *Section* 211—*Complaint before Magistrate—False Charge before Police—Police Reports—Sanction to prosecute—Procedure.*

A sanction for a prosecution under section 211 of the Indian Penal Code given without all the witnesses whom a complainant wishes to produce being heard in Court is illegal.

In the matter of Chukradar Potti, post p. 289 followed.

EFERENCE under section 296 of Act, X of 1872. The circumstances as stated in the order of Reference were as follows:—

The accused on the 1st October 1880 at Napo Police Outpost gused Bali Jama and others of arson under section 436 of the Penal de. The police took up the enquiry and after some time reported false, and the Magistrate thereupon sanctioned a prosecution under ction 211 Indian Penal Code. Previously to this order, however, e accused, Shibo Behara had presented a petition asking for a dicial enquiry. This petition does not seem to have been disposed and the accused certainly did not get what he asked and what he d a right to ask for. The case was sent to a Deputy Magistrate for uiry, and that officer committed it to the Court of Session. At Sessions accused pleaded not guilty and objected to being tried the ground that he had been seriously and lawfully prejudiced the failure to grant him the judicial enquiry he asked for.

1881.

EMPRESS v. SHIBO BEHARA.

Judgment.

The following cases were referred to, viz. :—

Bishoo Barik, 16 W. R., 77; *Bilash* v. *Makroo*, 2 B. L Short Notes, 15; *Nusibunnissa* v. *Sheikh Erad Ali*, 4 C. L. R., *Sheikh Erad Ali* v. *Nusibunnissa*, 4 C. L. R., 534; *Empre Karimdad*, 7 C. L. R., 467.

The following judgments were delivered by the High ((1) :—

MITTER, *J.* :—Whether the Judge was right or not in post ing the trial after it had once begun, I think this Court has power to quash an illegal commitment at any stage of a Crim Proceeding.

In these two cases I am of opinion that the commitme should be set aside on the ground that the sanction for prosecu under section 211 was illegally given. Whatever might have b said in *Nusserbunnissa* v. *Sheikh Erad Ali*, 4 Cal., 413, the later c have distinctly laid it down that a sanction for prosecution u section 211 given without hearing all the witnesses whom a c plainant wishes to produce in Court is illegal. In these cases, th fore, the original orders sanctioning prosecution under section 21 illegal. That being so the commitments are also illegal. I w therefore set them aside as recommended by the Judge.

MACLEAN, *J.* :—The principle involved in these cases is same as those involved in the case of *Chukradhar Potti*, *post* p. just disposed of, and as I am of opinion that any conviction upon the trials under the commitments which we are asked to q would be set aside. I think the simplest course is to set aside proceedings at this stage.

(1) MITTER and MACLEAN, *JJ.*

[CRIMINAL JURISDICTION.]

1881.
April 6th.

No. 2 of 1881.

THE MATTER OF GYAN CHUNDER ROY,..... PETITIONER.

iminal Procedure Code Act, X of 1872, *Sections* 147 *and* 470—*Penal Code Act, XLV of* 1860, *Section* 211—*Dismissal of Complaint without examination of witnesses of Complainant—Sanction to prosecute under Section* 470 *of Criminal Procedure Code.*

A Magistrate before whom a complaint had been made, after examining the complainant, but without examining his witnesses, dismissed the complaint under Section 147 of the Civil Procedure Code.

Shortly afterwards the person accused applied to the Magistrate and obtained sanction under section 470 of the Criminal Procedure Code to prosecute the complainant under section 211 of the Penal Code, and proceedings were thereupon commenced before another Magistrate who subsequently committed the original complainant to the Court of Session. No application was made that a further enquiry might be made notwithstanding the order of dismissal.

Held, that the proceedings in the original complaint had been terminated in a regular manner, and therefore the order sanctioning the prosecution was not illegal by reason of the Magistrate not having examined the witnesses of the complainant.

Syed Nissar Hossein v. *Ramgolam Singh*, 25 W. R. Cr., 10 dissented from.

OTION to set aside an order passed by the Officiating Magis- e of Dacca, dated the 18th November 1880, and an order passed the Officiating Joint-Magistrate of Dacca, dated 20th December 0.

In this case the petitioner Gyan Chunder Roy on the 11th ember 1880 lodged a complaint before the police against Protap nder Dass for assaulting and striking him with a stick in the eding evening, in consequence, he alleged, of his having refused ibmit to the inducements offered by Protap Chunder Dass for purpose of committing an unnatural offence.

1881.

In re of GYAN CHUNDER ROY.

On the same day the Sub-Inspector of Police examined witnesses offered by the petitioner as well as the accused Chunder Dass, and being of opinion that the latter had con the offence complained of enlarged him on bail to appear bel Magistrate.

On the 15th, the Assistant Superintendent of Police fresh investigation into the case; but examined only three out of several produced by the petitioner. He also examii accused Protap Chunder Dass, and in the end pronounced th plaint to be false.

Thereupon a formal complaint was preferred by the pe to the Magistrate on the 17th.

On the day following the Magistrate examined the pet and without taking the evidence of any of the witnesses me in the petition of complaint of the 17th November, dismis complaint at once, and in his judgment stated that the Protap Chunder Dass was bound to prosecute the petitio instituting a false complaint and for defamation.

Accordingly on the 1st December, Protap Chunder Dass to the Magistrate for sanction to prosecute for making a fal plaint and for defamation, and sanction was granted and the cution instituted.

On the 20th December the Joint-Magistrate having e into the case committed the petitioner to the Court of Ses making a false charge under section 211; for giving false e under section 193, and for defamation under section 500 Indian Penal Code.

The petitioner now sought to have the orders passed Magistrate on the 18th November sanctioning the prosec by the Joint-Magistrate on the 20th December committi the Sessions Court set aside as illegal on the ground that in as this was a warrant case the Magistrate was not com dismiss the complaint without examining all the witnesses the petitioner.

Evans and *M. Ghose* and Baboo *Doorgamohun Dass* *Lalmohun Dass*, for the Petitioner.

Paul (Advocate-General) and *Branson* and Bab *Nath Dass*, *contra*.

1881.

In re of GYAN CHUNDER ROY.

Judgment.

CUNNINGHAM, *J.*

The following judgments were delivered by the High Court :—

CUNNINGHAM, *J.* :—The question raised in this case is the competence of a Magistrate under section 147 of the Criminal Procedure Code to dismiss a complaint, and under section 468 of the Code to sanction the prosecution of the complainant for making a false charge, without hearing the complainant's evidence.

I see no reason to question the legality of the Magistrate's proceeding. Section 147 empowers the Magistrate to dismiss the complaint, if after examining the complainant, there is in his judgment no sufficient ground for proceeding; and there is nothing in section 468 to indicate that any particular proceeding on the part of the Court giving the sanction is essential to its validity, such as, for instance, is necessary in the case of a Court committing a case or sending it for enquiry under section 471. I am unable to concur in the opinion expressed on this point, in the case of *Syed Nissar Hossein* v. *Ram Golam Singh*, 25 W. R. Cr., 10. The application must be rejected.

PRINSEP, *J.*

PRINSEP, *J.* :—The petitioner Gyan Chunder Roy made a complaint to the Police which after investigation was reported to the Magistrate as false. He then repeated his complaint before the Magistrate, who examined him under section 144 of the Code of Criminal Procedure and dismissed the complaint under section 147. A fortnight later the person accused applied to the Magistrate and obtained sanction to prosecute the complainant for having falsely charged him. Proceedings were thereupon commenced before another Magistrate who on the 20th December, committed the petitioner to the Court of Session. The petitioner has now applied to this Court to have the order of dismissing his complaint set aside, and the order sanctioning the criminal prosecution and the proceedings taken thereunder, quashed on the sole ground that the Magistrate was not competent to dismiss the complaint or to sanction the prosecution [under section 211 of the Indian Penal Code] without first examining all the witnesses offered to prove it. Several cases decided by this Court, have been cited by Mr. M. Ghose in support of this contention, but it appears to me that with the exception of one case, that is the case of *Syed Nissar Hossein* v. *Ram Golam Singh*, 25 W. R., Cr., 10 none of them are precisely in point.

(1) CUNNINGHAM and PRINSEP, *JJ.*

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Judgment.

PRINSEP, *J.*

There is clearly a distinction between a sanction given u section 470 of the Criminal Procedure Code and the institutio proceedings by a Court of its own motion which is provide by section 471. The case now before us is one coming u section 470, which refers to private prosecutions, under obtained, for certain offences specified in sections 467, 468 and Before sanction to prosecute can properly be given, it is neces that the proceedings on the original complaint should have te nated in a regular manner. The Court should then consider (as been pointed out in the cases of *Reg.* v. *Mahomed Hossein*, 16 W. 37 and *Radha Nath Banerjee*, Marshal's Rep., 407) whether t are good grounds for the application made to it, or whether it been made solely for the purpose of oppressing and harassing adversary and preventing him from taking any further legal s to which he may be entitled. As has been pointed out also in case of the *Queen* v. *Baijoo Lall*, I. L. R. 1 Cal., 450, (see page 4 "it is by no means in every instance in which a party fails to p "his case, that the Judge, who has decided against such par "justified in exercising the powers given him by this section. "long as it is a case as to which there is any possible doubt, "which it is not perfectly certain that the Judge's decision mu "upheld in the event of there being an appeal in the Civil "the Judge acts indiscreetly and wrongly, if, the moment he "given his judgment in the Civil Suit, he exercises the power "him by this section. At the same time, if, in the course of the "trial, the Judge has before him clear and unmistakable pro "a criminal offence, and if, after the trial is over, he, on con "ation, think it necessary to proceed at once, of course it may be "to do so. Judges should, however, bear in mind that cri "prosecutions are frequently suggested by successful liti "merely to prevent an appeal in Civil Suit; and they sho "careful not to lend themselves to such suggestions too re "They should also recollect that when they proceed under "471, the responsibility for the prosecution rests upon the "entirely; such a prosecution being a very different thing "a prosecution instituted on the complaint of a private pa "merely sanctioned by the Court under section 468." cases cited before us, that is to say, in 16 W. R., 44,

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PRINSEP, *J.*

, 281, and 7 Cal. L. R., 382, prosecutions were ordered simply
e report of the Police that the complaints made, had, on
igation, been found to be false. In all these cases, and also in
ase of the *Queen* v. *Karimdad*, 7 C. L. R., 467 decided by
H, *C. J.* and FIELD, *J.* on the 9th December 1880, the Court
ointed out the impropriety of acting solely on the report of
olice, and without having considered the statement of the
lainant or the evidence tendered by him. In the cases *Reg.* v.
Lall Ghose, 13 W. R., Cr., 37 and *Gangoo Singh*, 2 Cal. L. R.,
the Magistrate had commenced to hear the evidence tendered
e complainant and closed the proceedings summarily without
ng all the witnesses cited so as to make the order of discharge
proper order within the terms of section 215, Explanation III,
e Code of Criminal Procedure. These are cases very different
the case now before us, in which, after hearing the complainant,
Magistrate was fully competent to dismiss the complaint, and
t an end to all proceedings before him.

In the case of *Gangoo Singh*, 2 Cal. L. R., 315, the Magistrate
ed a prosecution for a false complaint after he had passed
rder of dismissal under section 147; but in that case he took
himself to direct the institution of a prosecution acting under
n 471, and he was therefore under the terms of that section
d to make such preliminary enquiry as might be neces-
before directing a prosecution to be instituted; and the
there held that he was bound to give the complainant an
rtunity of shewing that there were no grounds for instituting
a prosecution. That, however, is a very different case from the
nt one in which the responsibility of instituting a criminal
cution was accepted by a private party, the proceedings on the
al complaint had regularly terminated, and, from what had
ly taken place before him, the Magistrate was satisfied that
ave asked for should be granted.

I concur in the view of the law expressed by JACKSON, *J.* in the
f *Biyogi Bhagut*, 4 Cal. L. R., 134. In that case, however,
rder was set aside on the ground that the order of dismissal
section 147 had not been properly passed, because the com-
nt had not been examined.

t was certainly open to the complainant in the case now

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before us, if he thought proper, to apply for an order, under sec 298 that a further enquiry into his complaint might be m notwithstanding the order of dismissal, but he did not thin proper to do so, nor has he at any time, until the lapse of s six weeks, and after, on proceedings taken against him, he has b committed to the Court of Session for making a false compl thought proper to take any steps to have his complaint retried, to have any witnesses examined.

The fact that he has taken no action in the matter seems me to distinguish the present case from the case of *Syed Nis Hossein* v. *Ram Golam Singh*, 25 W. R., Cr., 10. But even this were not so, I am not disposed to concur in the view l down by the learned Judges in that case when they say th it was "clearly illegal on the part of the Assistant Magistr "and Magistrate to give sanction under section 211 of the Ind "Penal Code without giving the petitioner an opportunity "adducing evidence to prove that the charge which he made "a true one."

On these grounds I am unable to find anything illegal in proceedings which have already taken place; and I accordin concur in discharging this Rule.

[CRIMINAL APPELLATE JURISDICTION.]

ROHLIA MAHTO,..... APPELLANT;

AND

EMPRESS, ... RESPONDENT.

1881.
March 25th.

No. 162 of 1881.

Evidence Act, I of 1872, *Sections* 32 *and* 33—*Deposition of deceased witnesses*—"*Issue substantially the same.*"

The deposition of the complainant upon a charge of grievous hurt having been taken before the Magistrate, the complainant died. In consequence of his death, charges of murder and culpable homicide not amounting to murder were added before the Sessions Judge.

Held, that the deposition of the complainant before the Magistrate was admissible in evidence before the Sessions Court under section 33 of the Evidence Act.

Per Curiam:—By "the questions in issue" referred to in section 33 of the Evidence Act being required to be "substantially the same," it is not intended that, in a case where the person injured dies subsequently to the enquiry before the Magistrate, his evidence is not to be used before the Sessions Court because in consequence of his death other charges are framed against the accused. * * * The matter depends upon whether the same evidence is applicable, although different consequences may follow from the same act.

APPEAL from a conviction and sentence passed by the Officiating Sessions Judge of Patna.

M. P. Gasper, for the Appellant.

M. Ghose, for the Prosecution.

The facts appear from the following judgment of the High Court (1) which was delivered by—

PONTIFEX, *J.*:—This is an appeal from a conviction by a jury in respect of which we can only interfere if there has been some

(1) PONTIFEX and FIELD, *JJ.*

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Judgment.

PONTIFEX, *J.*

error of law or misdirection by the Judge. Now it is alleged we ought to interfere on two grounds: *first*, that evidence has wrongly placed before the jury; and, *secondly*, that in certain ticulars there has been a misdirection or rather a want of dire by the Judge.

With respect to the first ground, that improper evidence been placed before the jury, the complaint is that the deposition two witnesses who were examined before the Magistrate were properly allowed by the Judge to be put in by the prosecution used in the Sessions Court under the following circumstances:—

One of these witnesses—the person whom the defen and his party were accused of assaulting, has since died. I before the Magistrate the only complaint was a charge of g vous hurt. But in consequence of the death of the person was hurt, *viz.*, Khedroo, other charges were added before Sessions Judge, *viz.*, a charge of murder and a charge of culp homicide not amounting to murder. In consequence of these additi charges, it is argued that under section 33 of the Evidence Act, questions in issue before the Sessions Court and before the Ma trate were not substantially the same in the two proceedings. a matter of fact the prisoner has only been convicted of grie hurt, and therefore the issue that was before the Magistrate wa only issue that has been decided against the accused by the It appears to us that by "the questions in issue," referred section 33, being required to be "substantially the same," it i intended that in a case where the person injured dies subsequ to the enquiry before the Magistrate, his evidence is not to be before the Sessions Court, because in consequence of his death charges are framed against the accused. We are of opinion the evidence of the deceased in this case was admissible under tion 33; and even if it were not admissible under section 33, t would be admissible under the first clause of section 33 o Evidence Act. In considering whether the proviso to section applicable, that is, whether the questions, at issue are substa the same, it depends upon whether the same evidence is app although different consequences may follow from the sam Now, here the act was the stroke of a sword which though not immediately cause the death of the deceased person yet co

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PONTIFEX, *J.*

bring about that result subsequently. In consequence of the son having died, the gravity of the offence became presumptively reased; but the evidence to prove the act with which the ac- sed was charged, remained precisely the same, we therefore think at this evidence was properly admitted under section 33.

With respect to the other deposition which was put in and read fore the Sessions Court, it appears that a person named Jan Ali, ged to be the Gomashtah of the Ticcadar, was examined before the agistrate and that he lived in the Cutchery house. A summons s properly taken out to be served on Jan Ali at the Cutchery use; but the peon in his return stated that as he was unable to d Jan Ali and serve him personally, he hung up the summons the Cutchery house. There is also evidence to show that Jan i suddenly disappeared from the Cutchery house. It is further ewn that inquiry was made in his native village whether he had turned there, but the result of the inquiry was that nothing had en heard of him. It was therefore impossible to say where Jan Ali as or to serve him with a summons. We think, under these cir- umstances, that his deposition was properly useable under section 33 fore the Sessions Court, and it does not appear that any objection as made before the Judge to its admission. We find on the cord no petition or memorandum shewing that objection was ade when the deposition was read; but we do find that on the rt of the defendant himself, the deposition before the Magistrate one of his own witnesses was put in and was used as evidence. e think, therefore, that both these depositions were properly ad- itted by the Judge to be used as evidence in this case.

We then come to the next ground before us that there has en misdirection by the Judge or rather a want of sufficient direc- n to the jury. It is alleged that many matters were not men- ned by the Judge in his charge which ought to have been ught to the notice of the jury; and in particular, stress was laid the fact that the Judge made no reference whatever to the evi- ce of the witnesses for the defence. We asked that the evidence the witnesses for the defence should be read to us, and it has n read to us, and we have no hesitation in saying that the Judge making no reference to it in his charge to the jury, acted favor- rather than otherwise towards the prisoner. For if reference

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Judgment.

PONTIFEX, *J.*

had been made to that evidence it would at the same time hav been necessary to point out to the jury that the witnesses were n in accord with one another; that their statements were discrepan and that the evidence of the principal witness who is now rel upon for the defence was really unreliable. Moreover, we kn that the prisoner was defended by Counsel in the Court below; a although particular points may not have been alluded to in t Judge's charge to the jury we have little doubt, that they were m and properly made much of by the defendant's Counsel. It i therefore not to be assumed that these points were absent from th minds of the jury in considering their verdict. It is impossible fo a Judge in summing up to go into every particular of the evidence It is only necessary to direct the attention of the jury to the im portant and salient points in the case.

There is one other objection to which it is necessary and that an objection that is taken before us as to the constitution of t jury, but about which there is nothing, in the grounds of appeal this Court. It is stated that the Foreman of the Jury was a c in the Magistrate's office. This is the only ground, as we unders it, on which objection could be made to him. He was challen before the Judge, and it was for the Judge to decide whether t grounds of the challenge were such that he ought not to be allow to sit on the jury.

The Judge was not satisfied that the grounds were sufficie nor do we see any reason why his being a clerk in the Magistra office should disqualify him from sitting on the jury.

Under the circumstances we must dismiss this appeal. conviction and sentence will stand.

[CIVIL APPELLATE JURISDICTION.]

ROY GOBERDHUN LALL (DEFENDANT), ... APPELLANT;

AND

SINGESSUR DUTT KOER AND OTHERS (PLAINTIFFS), ... RESPONDENTS.

1881.
Feb. 11*th.*

No. 231 of 1879.

Mitakshara Joint Family—Debts—Onus—Partition as between sons and deceased father.

The father of a Mitakshara joint family, against whom a decree upon a bond executed by him, had been obtained by the defendant, having died after the ancestral property of the family had been attached in execution of the decree, his sons and widow brought a suit praying for partition as between themselves and the deceased father, and for a declaration that on such partition the shares allotted to them were free from liability to satisfy the decree held by the defendant. The plaintiffs alleged that they had not, and it was not shown that they had, received any benefit from the consideration upon which the bond was given.

Held, that as the plaintiffs had not shown that the debt was contracted for immoral purposes, the whole ancestral property in their hands was liable to satisfy the decree.

Held further, that there could not be such a partition as that prayed for.

APPEAL from a decree passed by the Subordinate Judge of rhoot on the 9th May 1879.

It appeared that the defendant had obtained a decree upon a ortgage executed by one Chunder Mun Koer, the father of the ale plaintiffs and husband of the female plaintiff, and had attached rtain ancestral property of the joint family which was governed Mitakshara Law. While this attachment was subsisting Chun- r Mun Koer died. The plaintiffs thereupon brought this suit, alleg- g that the bond upon which the decree had been executed, had en executed, without their consent, for the purposes of Chunder un's own personal benefit, and praying for a declaration that they re entitled to have their shares respectively partitioned from that

1881.

ROY GOBERDHUN LALL v. SINGESSUR DUTT KOER.

Judgment.

of Chunder Mun, and declared free from liability to satisfy decree held by the defendant.

The defendant alleged that the bond had been given to s a debt not incurred for immoral purposes but for the benefit o joint family. The Subordinate Judge held that the *onus* was the defendant to show that the plaintiffs had been benefited b money secured by the decree, and that he had discharged that He was of opinion that the share of Chunder Mun only was to satisfy the decree, and that the plaintiffs were entitled to their shares separated from his share, and he accordingly m decree for such partition, and declared the shares of the plain free from liability to discharge the defendant's decree.

The defendant appealed against the decree of the Subordi Judge.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Aubinash C der Banerjee*, for the Appellant.

Baboo *Kali Kishen Sen*, for the Respondents.

The judgment of the High Court (1) which was as f was delivered by—

MITTER, *J.*

MITTER, *J.* :—This suit was brought by the plaintiffs, se number, for obtaining a partition of a 4 annas share of mouzah pur, and 7 annas of mouzah Chuck Ibrahim between themselv Chunder Mun Koer the deceased father of the plaintiffs Nos. 1 and husband of plaintiff No. 7, and for a declaration that the sh be allotted to them is not liable to be sold in execution of a d dated 20th July 1875 passed against the said Chunder Mun The facts alleged in the plaint are that the plaintiffs Nos. with Chunder Mun Koer their father, and the plaintiff No. mother were members of a joint Hindoo family holding possession of ancestral property consisting of among oth mouzahs aforesaid; that Chunder Mun Koer on the 17th 1874 executed a bond in favour of the defendant (the p not being aware for what necessity the aforesaid bond was e that in that bond the above-mentioned shares of the mouzahs were hypothecated; that the defendant, on the July 1875 obtained a decree on the strength of that bond

(1) MITTER and MACLEAN, *JJ.*

on of that decree the said shares were attached. Chunder .oer died after the mouzahs were thus attached. Upon these ıe plaintiffs contend that they are entitled to the declaration .e relief mentioned above. The defendant alleges in the statement that the mouzahs in dispute are the self-acquired y of Chunder Mun Koer, that the debt contracted by Chun- n Koer not being for immoral purposes, but, on the other ıaving been necessary for the joint family is binding upon ns. The defendant therefore contends that the shares in n were liable to be sold in execution. The Subordinate Judge :hat the property in dispute was the ancestral property of ›r Mun Koer, and that it was not proved that the loan ed by the defendant on the 17th of May 1874 was necessary ıt family purposes. Upon these findings he passed the fol- judgment: "It is hereby declared that only $\frac{4}{8}$ annas of and $\frac{1}{8}$ annas share of Chuck Ibrahim are liable to be sold in ıtion of the defendants' decree against Chunder Mun Koer 30th July 1875. The remaining portions of 4 annas share and s share of those estates belong to the plaintiffs, and their shares be separated from Chunder Mun's share and should be ›ned between themselves." We think that this decree is ›us; because it seems to us that there could not be a partition n a person who is already dead and his sons. No doubt ing to the case of *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, 6 I. A., 88, (S. C.) I. L. R., 5 Cal., 148, and 4 C. L. R., the property under attachment had been sold, and if it een proved that the decree was a personal decree against ther, and that the debt for which the decree was passed ontracted for immoral purposes, the purchaser would have d only the interest of the deceased father and a partition have taken place between the purchaser on the one hand e sons and the widow on the other. That is not the case ecause although there was an attachment in the lifetime of her that attachment was not followed by a sale. It may be he defendant decree-holder would not proceed upon that ment. In that case the decree which has been passed by the Court would be wholly infructuous. We are, therefore, of n that the decree passed by the Lower Court cannot stand. ears to us that the only declaration which in this suit the

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Judgment.

MITTER, J.

plaintiffs can obtain is, that they are not liable to pay the debt d to the defendant under the decree of July 1875. The Lower Co has gone into that question in its judgment and has decided it favour of the plaintiffs.

This question has been set at rest by the decision in the c of *Muddun Thakoor* v. *Kantoo Lal*, L. R., I. A., 321. In t course of the judgment in that case their Lordships of the Judic Committee observe: "In the case which has been referred to argument of *Hunooman Persaud Panday* v. *Mussummat Babo Munraj Koonweree*, 6 Moore I. A., 408, Lord Justice Knight Bruc who delivered the judgment of the Privy Council, says: Thou an estate be ancestral, it may be charged for some purposes again the heir for the father's debt by the father, as indeed the case abo cited from the sixth volume of the Decisions of the Sudder Dewann Adawlut, North-Western Provinces, incidentally shews. Unle the debt was of such a nature that it was not the duty of the s to pay it, the discharge of it, even though it affected ancest estate, would still be an act of pious duty in the son. By the Hi doo Law the freedom of the son from the obligation to discha the father's debt has respect to the nature of the debt, and n to the nature of the estate, whether ancestral or acquired by t creator of the debt." It is quite clear from this passage that wh ther the original debt was a personal debt of the father or not, t ancestral property in the hands of the sons would be liable to sati it unless it be proved that it was contracted for immoral purpo This is clearly an authority to show that unless the debt is pro to have been contracted for immoral purposes, the defendan entitled to recover it by the sale of the ancestral property in hand of the sons. In this case although the plaintiffs did not al that the debt was contracted for immoral purposes still that q tion has been gone into by the Lower Court and found to be established. This being so, we are of opinion that the Lower C was wrong in holding that the whole of the ancestral estate in hands of the sons is not liable for the money which is due to defendant under the decree of July 1875.

The plaintiffs suit must therefore be dismissed with co all the Courts.

[CIVIL APPELLATE JURISDICTION.]

1881.
April 13*th*.

No. 2832 of 1879.

LAS CHUNDER GHOSE AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

DO CHUNG BARUI AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

tation Act, XV of 1877, *Section* 26 *illustration* (*b*)—*Prescriptive Right—Easements—*"*Enjoyment of right*"—"*Actual use*"—*Illustrations in Legislative Enactments, Effect and Force of.*

The plaintiffs having for upwards of 20 years enjoyed the right of passage for their boats over the defendants' land when that land was flooded in the rainy season, the defendant in June 1876, before the rains had commenced, put up obstructions with a view to prevent the exercise of that right. In April 1878 the plaintiffs filed a suit for the removal of the obstructions and for a declaration of their right, but it was objected that there had been *no exercise of the right by actual user proved to have taken place within* 2 *years before the institution of the suit* within the meaning of the words of illustration (*b*) to section 26 of the Limitation Act.

Held, that the illustration relied on could not be allowed to curtail the ordinary sense of section 26 of the Limitation Act to which it was appended, and that under that section it was only necessary that the enjoyment of the right claimed should have continued until within two years before suit, and that it was not necessary that there should be *actual user or exercise of the right.*

The illustration referred to, which seems to make "enjoyment" equivalent to "*actual user*" must be rejected.

Baboo *Luchmee Pershad Narain Singh* v. *Tiluckdaree Singh*, 24 W. R., 295 and *Gopee Chand Setia* v. *Bhoobun Mohun Sen*, 23 W. R., 401 distinguished.

Rajroop Koer v. *Syud Abdul Hossein*, 7 C. L. R., 529, considered.

PEAL from a decree passed by the Second Subordinate Judge ncea, dated the 13th October 1879, reversing the decree of the ating First Moonsiff of Moonsheegunge, dated the 28th Decem-878.

1881.

KOYLAS CHUNDER GHOSE v. PUDDO CHUNG BARUI.

Judgment.

The facts are sufficiently, for the purposes of this report, in the judgment of the High Court.

Baboo *Hurry Mohun Chuckerbutty*, for the Appellants.

Baboo *Guru Dass Banerjee*, for the Respondents.

The judgment of the High Court (1) was as follows :—

The plaintiffs in this suit claim a prescriptive right of p for boats over the defendant's land, when it becomes covere water during the rainy season.

The first Court found that the plaintiffs had enjoyed thi for upwards of 20 years; and accordingly made a decree f removal of certain obstructions which were put up by the dants in June 1876, for the purpose of preventing the pl from exercising their right.

The Lower Appellate Court does not expressly negat finding of the Lower Court upon the facts, although it throw doubt upon its correctness. But it has decided against the tiff upon the preliminary ground, that *as no actual exercise right had taken place within two years before suit*, the plaint barred by limitation.

From this judgment the plaintiffs have appealed, and w therefore to consider the true meaning of the last clause of 26 of the Limitation Act, more especially when applied to t ticular kind of easement, with which we are now dealing. order to see precisely how the question arises in the present it will be well to take the facts as found by the first Court.

The plaintiffs have enjoyed for upwards of 20 years th of passage for their boats over the defendant's land, when th is flooded in the rainy season.

The first interruption of the plaintiff's right occurred 1876, before the rains had commenced; when the defend a view of preventing the plaintiffs from exercising their up the obstructions, which are the subject of complaint.

On the 6th of April 1878 or about 1 year and 10 mo the interruption, this suit was brought.

Now if the right was enjoyed by the plaintiffs fo before the interruption, and the interruption itself w

(1) GARTH, *C. J.*, and MCDONELL, *J.*

1881.

KOYLAS CHUNDER GHOSE v. PUDDO CHUNG BARUI.

Judgment.

each of the enjoyment, it is obvious, that the enjoyment must ve continued up to a time within two years before suit; in which se there would be no bar.

But the Sub-Judge considers that because there was no *actual ercise of the right* within the 2 years the suit is barred.

He relies upon two decisions of this Court, one in 24 W. , 295 which does not support him at all, as there the alleged ght was interrupted more than 2 years before suit; and the her, in 23 W. R., 401 which only supports him to this extent, at the learned Judge in that case refers to Illustration (b) of tion 26 as shewing that there should be some actual user of the ht within 2 years before suit. It is no doubt upon the strength Illustration (b) that the Subordinate Judge has dismissed the it, and we cannot blame him; for when the language of a section ints to one view of the law, and one of the illustrations of the tion points to another, it is a very difficult thing for the Subor- nate Judiciary to decide which view to adopt.

Indeed it is very difficult for the High Court, whose duty it is construe recent Acts of the Legislature to say what precise weight ght to be attached to these illustrations. So far as they merely ve to exemplify the meaning of the section, we have no doubt at they may often be found useful, especially amongst a class of dicial Officers who are not very conversant with the meaning or rking of the section itself.

We have already decided moreover more than once in this rt, that the illustrations ought never to be allowed to control plain meaning of the section itself, and certainly they ought not do so, when the effect would be to *curtail a right*, which the tion in its ordinary sense would confer.

It will be sufficient to say no more than this for our present rpose.

The 26th Section of the Limitation Act only renders it neces- y, as far as we can see, *that the enjoyment of the right claimed* uld have continued till within 2 years before suit. The section s not a word, as to any *actual user or exercise of the right* hin the two years. It is obvious to us that the enjoyment nded by the section means something very different from actual r. In order to establish the right the enjoyment of it must con-

1881.

KOYLAS CHUNDER GHOSE v. PUDDO CHUNG BARUI.

Judgment.

tinue for 20 years; but in the case of discontinuous easements, does not mean that *actual user* is to continue the whole per 20 years. On the contrary, there may be days, and weeks months, during which the right may not be exercised at all; yet during all those days and weeks and months the person e ing the right may have been in the full enjoyment of it.

The easement with which we have to deal in the presen affords a remarkable illustration of this.

The right which the plaintiffs claim can only be used by during the 2 or 3 months of the year, when the defendant's la flooded; and if there were a lack of rain, it is probable, tha for 20 or 21 months the right might not be exercised at all yet so long as the plaintiffs' right was not interfered with, wh they had occasion to use it, their enjoyment must, we conce considered as continuing during all the year round.

Unless this were so, a person in the plaintiff's position could only use his right during a short period of the year never gain a prescriptive right at all.

Illustration (b) therefore which would seem to make "ment" equivalent to "*actual user*," must, we think, be rej especially as the latter clause which follows the words—"The sui be dismissed" are obviously quite unnecessary for the purposes illustration.

If the view which we take in their respects is not the one, the only way for persons in the plaintiff's position to e their rights by prescription would be to bring their suits cl not under the Limitation Act, but by *immemorial user*, and Court to presume their rights after a 25 or 30 years' en unless the defendant can show anything to the contrary. Lordships in the Privy Council have lately held that necessary that such rights should be claimed under the Li Act, see *Maharani Rajroop Koer* v. *Syud Abul Hossein*, d the Privy Council 14th July 1880, 7 C. L. R., 529.

This case must therefore go back to the Lower Appell to try the question, whether the plaintiffs have enjoye sense which we attribute to the word "enjoy") the r they claim for 20 years before the obstructions was put up in

The costs in this Court and in the Court below will result.

[CIVIL APPELLATE JURISDICTION.]

1881
March 27th.

No. 80 of 1880.

OSHI MOHUN PAL CHOWDHRY AND OTHERS (PLAINTIFFS), ... APPELLANTS;

AND

URU CHURN MUKOPADHYA AND OTHERS (DEFENDANTS), ... RESPONDENTS.

ccount, Suit against agent for—Act VIII (B. C.) of 1869, *Section* 30. *Limitation—Agent, Suit for account against.*

On the termination of the agency which took place on the 16th July 1875, a zemindar sued his agent who was employed in the management of his zemindaries for delivery of the accounts and papers in his hands as such agent, and obtained a decree. In execution of that decree the defendant filed his accounts, but not until the 2nd February 1878. On the 10th September of the same year, the zemindar brought a suit to recover the amount which he claimed to be due on the taking of the accounts.

Held, that in as much as this suit was filed more than 3 years from the termination of the agency it was barred by limit ation under section 30 of Act VIII (B. C.,) of 1869.

PPEAL from a decree passed by the Subordinate Judge of acca, dated the 1st October 1879, affirming the decree of the 1st oonsiff of Moonsheegunge, dated the 23rd April 1879.

The plaintiffs in this case sued the principal defendant to re-ver Rs. 374-15 in his hands as their agent. The other de-ndants were sureties for the principal defendant.

The agency was that of a gomastah or tehsildar in the manage-ent of zemindaries and in the collection of rents.

It was admitted that the agency terminated on the 1st Srabun 282, corresponding with the 16th July 1875. This suit was ed on the 10th September 1878 more than three years after that te. Both the lower Courts held that the suit was barred under tion 30 of Act VIII (B. C.) of 1869.

It appeared that before bringing this suit, the plaintiffs had ed the defendants for the recovery of the *nikashi* and other pers for 1280-1281 relating to the property under the manage-

1881.

SOSHI MOHUN PAL CHOWDHRY v. GURU CHURN MUKOPADHYA.

Judgment.

GARTH, *C. J.*

ment of the principal defendant; that under the decree in t suit, these papers were filed by the defendants on the 2nd Feb 1878; that on examination of these papers it appeared that cer monies received by that defendant had not been entered. present suit was to recover the amount which upon these p appeared to be due.

From the decree of the lower Appellate Court dismissing suit the plaintiffs appealed to the High Court.

Baboo *Bhoobun Mohun Dass*, for the Appellants.

Piffard and Baboo *Hurry Mohun Chuckerbutty*, for the Re dents.

The judgment of the High Court (1) which was as follow delivered by—

GARTH, *C. J.*:—We regret very much that we have no to assist the appellants. This is undoubtedly a very hard case them.

The defendant was sued for an account, but managed to delivering the account till it was too late for the plaintiffs t him for the amount due.

The Lower Courts have both decided in favor of the defen upon the ground of limitation, and very properly so. But it very hard under the circumstances to visit the plaintiff (wh been unjustly treated by the defendant), with costs, and alth we are compelled by law to confirm the decision of the Courts, we give the respondent no costs of this appeal.

This is one of the inconveniences, which we pointed ou a few days ago, of bringing a suit of this kind for an accou and not suing at the same time to have the account adjust the balance found to be due paid to the plaintiff. In a suit kind properly framed (as it always is on the original side Court,) the whole question between the parties is disposed suit, and the plaintiff secures his just rights, without the ri he always runs in a suit *for an account only*, of being b limitation when the account is delivered.

The plaintiffs have duly sued within one year from when the account was delivered, but they are barred unf

(1) GARTH, *C. J.* and MCDONELL, *J.*

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SOSHI MOHUN PAL CHOWDHRY v. GURU CHURN MUKOPADHYA.

the last clause of section 30 of Act VIII of 1869 (B. C.), which quires the suit to be brought *within three years from the date of e termination of the defendant's agency.*

The appeal is therefore dismissed, but without costs.

The judgment in this case will govern the appeal from ppellate decree No. 103 of 1880, which is also dismissed for the me reason, with costs.

Judgment.

GARTH, *C. J.*

[CIVIL APPELLATE JURISDICTION.]

1881.
Feb. 21*st.*

No. 224 of 1879.

ANHU KOER AND ANOTHER (OBJECTORS), ... APPELLANTS;

AND

OMIRUN THÀKUR (PETITIONER) ..... RESPONDENT.

Will—Probate—Succession Act (*X of* 1865) *section* 254.

Upon a *bonâ fide* application for probate of a will, it is not the province of the Court to which the application is made to go into questions with reference to the power of the testator to make a disposition of the property of which the will purports to dispose.

Behary Lall Sandyal v. *Juggo Mohun Gossain*, I. L. R., 4 Cal. 1 (S. C.) 2 C. L. R., 422, followed; *Komul Lochun Dutt* v. *Nilrutton Nunde*, I. L. R. 4 Cal., 360, (S. C.) 4 C. L. R., 175, commented on.

APPEAL from an order passed by the District Judge of Tirhoot n the 10th April 1879.

The petitioner in the case applied as executor for probate of he will of one Chowdhry Mohunt Rajaram Doss deceased. Under hat will the testator appointed Chowdhry Roghu Nath Doss, his minor brother and a *chela*, Mohunt of Janutpur.

A caveat was entered by Nanhu Koer the widow of the leceased. She objected, *inter alia*, that the testator was a mere nanager of the muth property and had no power to dispose of t:—that by reason of the testator's marriage with her subsequent o the date of the will, the will was inoperative; that at the time f the marriage the testator had agreed to cancel the will and ppoint her brother Sitaram to be the Mohunt;—that it did not

1881.

NANHU KOER v. SOMIRUN THAKUR.

Judgment.

clearly appear that the petitioner was the executor of the t that Raghu Nath Dass who had been appointed Mohunt been properly inaugurated, nor had he ever been a *chel* testator. The District Judge refused to go into the raised by the Caveator—and granted probate.

This appeal was thereupon preferred against his order.

Baboo *Prannath Pundit,* Baboo *Ashootosh Dhur,* a *Jugut Chunder Banerjea,* for the Appellants.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Rajen Bose,* for the Respondents.

The judgment of the High Court (1) was as follows :-

This appeal arises out of an order passed by the Distri of Tirhoot granting to the petitioner Sumrun Thakoor, pro will executed by Mohunt Rajaram Dass. The appeal h preferred by Musst. Nanhu Koer *alias* Luchmi Koer and who appeared as objectors before the Judge, questioning t dity of the will, that is to say, the power of the testator a disposition of his property. The District Judge relying u decision in *Behary Lall Sandyal* v. *Juggo Mohun Gossain,* I 4 Cal., 1 (S. C.), 2 C. L. R., 422 refused to go into the q In appeal it is contended before us that the District should have gone into it. The learned pleader who ap support of the appeal does not contend that the pres is distinguishable from the decision mentioned in the ju but he has endeavoured to establish a conflict in the of this Court, relying for that purpose upon another deci case of *Komul Lochun Dutt* v. *Nilrutton Mundle,* I. L. 350, (S. C.) 4 C. L. R., 175. But on examining that ca to us that really there is no conflict in the decisions of t What was laid down in this latter case was that a Civil subsequent suit cannot go into the question of the *gen* a will, if the Court granting the probate of it has d question. Therefore we are of opinion that the District right in refusing to go into the questions raised by th appellants.

The appeal will therefore be dismissed with costs.

(1) MITTER and MACLEAN, *JJ.*

[CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF CHUKRADAR POTTI, ... APPELLANT.

1881.
Jan. 20th.

No. 743 of 1880.

al Code Act, XLV of 1860, *Section* 211—*False Charge—Complaint before Magistrate—Investigation of Charge made before Police—Police Reports—Procedure—Criminal Procedure Code, Act X of* 1877, *Section* 147.

A charge laid against certain persons before the police, having been reported false by that body, the person who made the charge, complained to the Magistrate of the District who directed a fresh investigation. The charge was again reported false. The complainant thereupon filed a petition in which he alleged that the second investigation had not been properly conducted, and asked that further evidence might be taken by a specified officer.

No further investigation having taken place, the complainant was ordered to be prosecuted under Section 211 of the Indian Penal Code, and on trial was convicted and sentenced.

On appeal to the High Court, it was *held*, that the conviction was illegal in as much as an opportunity had not been afforded to the accused of producing all his evidence in support of the charge made by him.

In the matter of Russick Lall Mullick, 7 C. L. R., 582 and *In the matter of Biyogi Bhagut*, 4 C. L. R., 134 followed.

Per MACLEAN, *J.*:—The proper principle which should guide a Magistrate is that if no complaint is made before him after a reasonable time has elapsed from the conclusion of a police enquiry, he would be justified in proceeding against a person who has made a complaint to the police which has been found to be false; but if a complaint is made, that complaint must be dealt with judicially. It is unfair even then to proceed against the complainant without hearing any witnesses whom he may wish to examine.

Per MITTER, *J.*:—Although a Magistrate has power under section 147 of the Criminal Procedure Code to dismiss a complaint without examining witnesses, yet in such a case no sanction for prosecution under section 211 of the Penal Code, should be granted.

See *In the matter of Gyan Chunder Roy*, 8 C. L. R., 267.

1891.

In re of CHUKRADAR POTTI.

Judgment.

APPEAL from a sentence and conviction passed under section of the Indian Penal Code by the Sessions Judge of Cuttack.

In this case the appellant preferred a charge of dacoity a certain persons. He alleged they had assaulted his father and self, and had looted and carried away the property. On the nig the alleged occurrence he lodged information at the Thana, a statement was taken down on the following morning. An in gation was then made by the police and the charge was re to be false.

Upon this the appellant complained before the Magistra the District who directed a fresh investigation. Such inve tion was alleged by the police to have been made, but wit same result as in the former. The appellant, however, asked further investigation should be made, as he alleged the office had made the former investigations had been tampered wi the other side. Thereupon, without his request having been gr the appellant was charged under section 211 of the Penal and convicted by the Sessions Judge of Cuttack.

Against the conviction the present appeal was preferred.

The following judgments were delivered by the High (1) :—

MITTER, *J.* :—I think the prisoner in this case has bee judiced by the Magistrate not having taken evidence from h accordance with the prayer of his petition, dated the 1st July It is not fair to a person to refuse to hear his whole evidence he wishes to produce in support of his complaint, and then to his prosecution under section 211 of the Indian Penal Co having made a false complaint. It is true that a Magistra the discretion under section 147 of the Criminal Procedure C dismiss a complaint without examining witnesses, but in th no sanction for prosecution under section 211 should be g In this country a person when called upon to answer to a under section 211 will, in a majority of cases, find the greate culty in substantiating even a *true* case. I think thereb circumstance referred to above has materially prejudiced the lant in making good his defence; I would therefore on this alone set aside the conviction.

(1) MITTER and MACLEAN, *JJ.*

1881.

In re of CHUKRADAR POTTI.

Judgment.

MACLEAN, *J.* :—This is one of those cases in which a person ho has been unsuccessful in proving a case before the police has en prosecuted under section 211 of the Procedure Code in spite his endeavours to get his case judicially tried.

It appears that on the 23rd June the appellant Chukradar Potti id information of a dacoity at the Police Station. There was an vestigation by the police on more than one occasion, but the case s reported false. Orders were given on 26th and 27th July for osecution of the appellant Chukradar Potti.

Meanwhile he had on the 1st July complained that the police d sided with the zemindar, and had not made a proper investiga- n, and he requested that further investigation might be made a specified officer and that *evidence might be taken before him.*

I have been unable to discover that he was ever examined as ected by section 144 Criminal Procedure Code, or that he was r allowed to give any evidence before he was brought before the gistrate and the charge against him enquired into.

I have recently expressed my opinion that the course adopted his case is one which is eminently unfair to the person complaining his ill-success before the police. I see no difference between this e and the case I refer to, *In the matter of Russick Lal Mullick,* . L. R., 382, and the case of *Biyogi Bhagut,* 4 C. L. R., 134 es effect to a similar opinion.

The proper principle which in my opinion should guide a gistrate is, that if no complaint is made before him after a rea- able time has elapsed from the conclusion of a police enquiry he uld be justified in proceeding against a person who has made a mplaint to the police which has been found to be false, but if a mplaint is made, that complaint must be dealt with judicially. onsider that it is unfair even then to proceed against the com- nant without hearing any witnesses whom he may wish to mine.

I concur in setting aside the conviction.

[CRIMINAL APPELLATE JURISDICTION.]

1881. *Feb.* 22*nd.*

IN THE MATTER OF MAYADEB GOSSAMI, ... APPELL

No. 66 A.

Perjury in respect of evidence in a Civil Court—Evidence Act, 1872, Section 91*—Deposition of witness—Civil Procedure Code X of* 1877, *Sections* 182 *and* 183*—Admissibility of deposit witness in trial against him for perjury.*

The deposition of a witness in a Civil suit taken down in a guage other than that in which the evidence was given i admissible in evidence in a prosecution against him for perj respect of the statements made by him, unless the provisi sections 182 and 183 of the Civil Procedure Code, Act X of have been complied with.

APPEAL from a conviction and sentence passed under th cumstances appearing below in the judgment of the High Co

Baboo *Boikuntnath Dass*, for the Appellant.

The judgment of the High Court (1) was as follows:—

The prisoner in this case applied for a certificate under A of 1858 in respect of the estate of two infants, and in suppor application he gave a sworn deposition on 4th October last the District Judge.

His deposition was made in Assamese and was trans the Serishtadar of the Court, and the Judge recorded it in He did not sign it nor was it read over to the witness or t The requirements of sections 182 and 183 of the Civil P Code were therefore not complied with. This is clear fro position of the Serishtadar before the Deputy Commissio conclusion of the proceedings in his Court. The Judge that the prisoner had given false evidence, and he direc should be prosecuted. This has resulted in his convict this Court was of opinion, on the facts brought to its

(1) CUNNINGHAM and MACLEAN, *JJ.*

1881.

In re of MAYADEB GOSSAMI.

Judgment.

peal ought to be tried by the Judge before whom the false
e was given, the appeal has been called up to this Court.
is contended for the defence that the informalities which
ace in recording the accused's deposition render the record of
lence inadmissible, and that under section 91 of the Evidence
other evidence of his deposition is admissible.

'e consider this contention sound. By section 647 of the
Procedure Code the procedure prescribed by the Code is to
wed, as far as it can be made applicable, in all proceedings,
Court, other than suits and appeals. By section 178 a party
nit required to give evidence is governed by the rules as to
es; sections 182 and 183 therefore applied to the accused's
ion, and these sections not having been complied with, the
is inadmissible.

ie conviction must therefore be quashed and the prisoner
l.

ie record of the proceedings before the District Judge do not
hat the Serishtadar was sworn or affirmed as required by
1873, section 5 (b). The Judge's attention should be drawn
, and a copy of this judgment furnished to him from this

[SMALL CAUSE COURT REFERENCE.]

1881. *Feb. 8th.*

BUDDREE DOSS AND OTHERS ..... PLAINTIFF

AND

RALLI AND ANOTHER ..... DEFENDANT

Contract, suit for Breach of—Performance, Time for.

A contract dated 8th June 1880, for the sale of seed by plaintiff to the defendant, at so much per maund provided follows:—"Refraction guaranteed at 4 per cent. with usual allowance up to 6 per cent. exceeding which, the seller is to re-clean seed at his expense within a week; failing which, buyer to have option of cancelling that portion of the contract, tendered, or buying against the seller, or of taking the parcel as it stands usual allowance for excess refraction. Delivery from seller's go in pile, up to the 15th July next."

Notice having been given that the seed was ready for delivery the 10th July on delivery having been applied for, it was found examination that the refraction was above the contract rate. It then agreed that the vendor should re-clean the seed, and on the July, when delivery was again applied for, it was found, on the cleaned seed being examined that the refraction was still in cess of the contract rate.

On the 15th July the vendor asked for a week's time again clean the seed. The purchasers, however, cancelled the co In a suit by the vendors for damages for breach of the contra

Held, (1) that the breach of the contract was with the pl and (2) that the week allowed by the contract for re-clean seed commenced from the 10th July when the refraction was to be in excess of the contract rate; and that, as the plaintiff not succeeded in reducing the refraction to that rate within from that date, the defendant had a right to reject the seed.

REFERENCE submitted by the First Judge of the Small Court for the opinion of the High Court.

This suit was brought by the plaintiff to recover Rs as damages for breach of a contract dated the 8th June

1881.

BUDDREE DOSS v. RALLI.

ıe purchase by the defendants from the plaintiffs "of 100 tons of astern Bengal Double husk teel seed at Rs. 3-1 per maund. Refraction guaranteed at 4 per cent. with usual allowance up to 6 per cent., ceeding which, the seller is to re-clean the seed at his expense ithin a week, failing which, buyers to have the option of cancelling at portion of the contract tendered, or of buying against the ller, or of taking the parcel as it stands, with usual allowance for cess refraction. Delivery to be from seller's godown in pile, up the 15th July next."

On the 2nd July the broker in the transaction informed the fendants that the seed was ready for delivery. On the 10th a sircar the defendants went to take delivery, but on examination of the d he found that the refraction was about 13 per cent. It was then reed that the seed should be re-cleaned by the vendors, and portion it was re-cleaned. On the 13th July, another sircar went to take ivery of the seed so re-cleaned, but the refraction on examination s found to be about 10 per cent.

On the 15th July an interview was arranged at the broker's fice, and there the vendors asked for a week's further time to re-an the seed. The evidence does not show that there was an actual dusal to allow this indulgence, but it does not appear that the quest was acceded to. On the evening of the same day the plaintiffs tendered delivery, and the defendants replied tendering the ice of the goods and asking for delivery and giving notice that delivery were not given forthwith, they would consider the contract cancelled.

The vendors then brought this suit for damages for the breach contract.

They contended that as they had a week within which to perm the contract, they had up to the 22nd July within which to deer the goods, if previous to the 15th it turned out that the goods dered were above the stipulated refractiou.

The Judge of the Small Cause Court before whom the case s heard found that at no time previous to the 15th July, nor at y time up to the 17th, had the plaintiffs been in a position to liver 100 tons of teel seed as contracted for, but that they did in ct on the 15th July express a willingness to re-clean the seed thin one week. He was of opinion on the construction of the

1881.

BUDDREE DOSS v. RALLI.

Judgment.

contract that the plaintiffs were entitled only to one week fr time that the refraction was ascertained to be above the rat tioned in the contract, and that they were not entitled to re- often as they liked and then take a week over and above the di

The plaintiffs, however, asked that a reference might l to the High Court, and accordingly the following point referred:

Firstly. Whether the breach of the contract on the e before the Court is not clearly with the defendants, the contr viding one week for re-cleaning and the evidence being plaintiffs were willing on the 15th July to re-clean within or

Secondly. Whether the one week for re-cleaning provided in the contract was to commence from the 16th July, any prior date according to the construction of the contract.

T. A. Apcar, for the Plaintiffs.

Agnew, for the Defendants.

The opinion of the High Court (1) was as follows:—

1. We think that the first question should be answere negative.

2. As to the second question we think that the week for re-cleaning the seed commenced from the 10th July, w refraction was found to be 13 per cent. The time occupied defendants in re-cleaning was only two days; but as they succeed in reducing the refraction to the rate of six per c defendants had a right to reject the seed. It is clear th plaintiffs were not entitled by the terms of the contract further time to re-clean it again.

The defendants are entitled to the costs of this referen

(1) GARTH, *C. J.* and PONTIFEX, *J.*

[CIVIL APPELLATE JURISDICTION.]

ARUK CHUNDER MUKERJI (DEFENDANT), ... APPELLANT ;

AND

ANCHO MOHINI DABI (PLAINTIFF), ... RESPONDENT.

1881.
Feb. 17*th*.

No. 2111 of 1879.

cil Procedure Code, Act X of 1877, *Section* 43. *Illustration—Causes of Action, Joinder of—Omission to sue for entire amount of rent due.*

The authority of the decisions in the cases of *Rajah Sutto Churn Ghosal* v. *Obhoy Nund Doss*, 2 W. R. Act X Rul., 31, *Ram Soondur Sein* v. *Krishna Chunder Gupto*, 17 W. R., 380 and of *Kristo Kinkur Puramanick* v. *Ram Dhun Chettangia*, 24 W. R., 326 has been swept away by the provisions of section 43 of Act X of 1877.

There is no distinction so far as section 43 of Act X of 1877 is concerned between a suit omitting to claim an earlier rent and a suit omitting to claim a later rent due at the date of the institution of the suit.

PPEAL from a decree passed by the District Judge of the -Pergunnahs, dated the 12th August 1879 affirming the decree of e First Moonsiff of Basirhat, dated the 28th May 1879.

The plaintiff in April 1878 brought a suit for the rent of 1281. the time of the suit the rents for the years 1282 and 1283 were e. In that suit a decree was made for the rent claimed.

The plaintiff now sued to recover the rents due for the years 82, 1283 and 1284.

The Moonsiff allowed the suit and gave a decree for the amount imed.

On appeal the decree was affirmed by the District Judge. In judgment the District Judge said : "The Moonsiff rightly held t the claim "arising out of the cause of action" in April 1878 the arrears of 1281. There was an equally good cause of action ing out of two other causes of action, *viz.*, the arrears of 1282 1283, but as these are different causes of action there was no ropriety in bringing a separate suit for each claim. The illus-

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TARUK CHUNDER MUKERJI v. PANCHO MOHINI DABI.

Judgment.

tration to section 43 (of the Civil Procedure Code) refers to a v different sort of case. The rent of 1875 having been sued for, suit for prior rent would be admissible."

The defendant appealed to the High Court.

Baboo *Gurudoss Banerjee* and Baboo *Nogendronath Roy* the Appellant.

Baboo *Amarendronath Chatterjee* and Baboo *Mohil Ch Bose*, for the Respondent.

The judgment of the High Court (1) was as follows:—

In April 1878 rent being due from the defendant to the p tiff for the years 1281, 1282 and 1283, the plaintiff institu suit No. 467 of 1878, for the rent of 1281 for which she obt a decree.

Although that suit was instituted after Act X of 1877 into force, the plaintiff did not include in her suit the rent 1282 and 1283 which were also then due.

In April 1879 the plaintiff instituted the present suit fo rents of 1282, 1283 and 1284. With respect to the rents of 128 appears from the judgments of the Court below, that at the of the institution of the former suit, the year 1284 had not exp and therefore the entire rent for that year had not become The present suit would therefore lie for the rent of 1284.

But objection was taken by the defendant to the suit so f it related to the rents of 1282 and 1283, on the ground that should have been included in the former suit in accordance wit provisions of section 43 of Act X of 1877.

Now it was decided in the case of *Rajah Sutto Churn G* v. *Obhoy Nund Doss*, 2 W. R., Act X Rulings, 31, that a sep suit would lie for the rents of each year, and that decision ha the foundation of two other decisions by this Court in cases of *Soondur Sein* v. *Krishna Chunder Gupto*, 17 W. R., 380, and *Kinkur Puramanick* v. *Ram Dhun Chettangia*, 24 W. R., 326.

Speaking for myself I do not consider that the reasons f for the decision reported in 2 W. R., 41 are satisfactory; I should have been reluctant to be bound by it.

But section 43 of Act X of 1877 with the illustration th

(1) PONTIFEX and MCDONELL, *JJ.*

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TARUK CHUNDER MUKERJI v. PANCHO MOHINI DABI.

Judgment.

lirect legislative reversal of that decision. Now so far as this t is concerned, that decision with the two other cases founded on id established a procedure which until Act X of 1877 came peration would have been a sufficient authority for the course ed by the plaintiff in her suit No. 467 of 1878.

But a different procedure having been ordained by section 43 t X of 1877 which came into force on the 1st of October 1877, uthority of the three cases referred to has in my opinion been away.

It is true, the illustration to section 43 represents only the state of circumstances which existed in the case reported in R.; and it would have been clearer if the illustration had general and not confined to the peculiar circumstances of that But it was certainly intended to reverse the decision in R. and with it the entire foundation of the decisions in the two cases likewise falls. In my opinion, there can be no reason inguish between a suit omitting to claim an earlier rent and omitting to claim a later rent which is due at the date of its tion. The illustration certainly treats a claim to all arrears t as a single cause of action. I am unable therefore to agree he interpretation which the learned Judge in the Court below aced on section 43 of Act X of 1877, and I am of opinion he plaintiff was bound by that section to claim in her suit of he rents of the years 1282 and 1283; and that, having failed o, her present suit does not lie for their rents.

he decrees of the Courts below will therefore be reversed so relates to the rents of 1282 and 1283, and will be affirmed so relates to the rent of 1284.

his being a case of difficulty before us we think that there be no costs either in this or in the lower Courts.

[FULL BENCH.]

1881.
April 15th.

No. 790 of 1880.

EMPRESS,

AND

KASSIM KHAN,

EMPRESS,

AND

MUSSAMUT DABI AND ANOTHER,

Penal Code Act, XLV of 1860, *Sections* 191 *and* 193—*False Evid —Alternative Charge—Statements before Police—Criminal Pr dure Code Act, V of* 1872, *Sections* 118 *and* 119—*Obligatio state the truth—Police Investigation.*

A charge of giving false evidence under section 193 of the P Code cannot be sustained in respect of a statement made to a po officer engaged in making an investigation under the provision the Code of Criminal Procedure.

Sections 118 and 119 of the latter Code impose no legal obli tion on the persons examined thereunder to speak the truth.

Queen v. *Nim Chand Mookerjee*, 20 W. R., 41 overruled.

REFERENCE submitted by the Officiating Magistrate Midnapore for the opinion of the High Court.

The circumstances under which the Reference was made as follows :—

In a case under section 447 of the Indian Penal Code (Cri trespass) tried by Baboo Shamapodo Chowdhry, a Deputy M trate in the Sadar Subdivision, Kassim Khan a witness for the secution stated on oath that what he had said to the Police was his words being "আমি পুলিসে যে কথা কহিয়াছিলাম তাহা The police officer who conducted the case before the Deputy M trate applied to him for sanction for the prosecution of the w under section 193 of the Indian Penal Code which was g The accused witness was thereupon tried by the Joint-Magistra discharged him on the ground that the statement made by

1881.

EMPRESS v. KASSIM KHAN. EMPRESS v. MUSSAMUT DABI.

th could not be used against him as a defendant; and that he he Joint-Magistrate) saw no prospect of proving that the accused's tement to the Police was actually false.

It appeared to the Magistrate, on the papers being submitted to m, that the Joint-Magistrate was wrong in discharging the accused itness. He considered that the accused rendered himself liable om his own admission to a charge under section 193 of the Indian nal Code.

Under the circumstances, therefore, he submitted the matter r the opinion of the High Court, suggesting that the proceedings the Joint-Magistrate should be quashed, and an order for a re-trial rected.

The Reference came before PONTIFEX and FIELD, *JJ.*, and was them referred to a Full Bench in connection with another refer- ce in the case of one Mussamut Dabi, the facts of which it is necessary to set out.

In referring the matter to the Full Bench, the learned Judges pressed the following opinions:—

FIELD, *J.*:—The question submitted to the Full Bench I un- rstand to be this: can a person be convicted under section 193 of e Penal Code for giving false evidence, the words alleged to be lse having been spoken to a police officer engaged in making an vestigation under the provisions of the Code of Criminal Procedure.

The definition of giving false evidence (section 191) is,—"who- er—

(1) being legally bound by an oath,

(2) or by any express provision of law, to state the truth, or

(3) being bound by law to make a declaration upon any subject, akes any statement which is false, and which he either knows or lieves to be false, or does not believe to be true, is said to give lse evidence."

It will probably be admitted that (3) has no application to the esent case, and that it is concerned only with that class of cases, which the declaration to be made by a person obtaining a mar- ge license is an example.

Sections 118 and 119 of the Code of Criminal Procedure em- wer a police officer making an investigation to examine persons quainted with the facts of the case under enquiry, and enact that

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such persons *shall answer* all questions relating to such case, by such officer, except criminating questions. Such answers may reduced to writing, but they are not to be signed by the person mak them, nor are they to form part of the record, or be used as evide

These provisions of the Code of Criminal Procedure require persons examined to answer the questions put to them, but contain no express provision that such persons *shall state the t* This seems to take the case at once out of (2).

Then as to (1), can a police officer administer an oath? Code of Criminal Procedure does not provide for the administra of an oath by a police officer, but does not expressly prohibit it. the case of accused persons an oath is expressly prohibited. It never been usual for police officers to administer an oath. T were sections 4 and 5 of the Indian Oaths Act, X of 1873 inte to alter this practice? Consider the words "who may lawfull examined.....before any person having by law.....au rity to examine such persons," in section 5. My own view is the practice was not meant to be altered.

If, as a matter of fact, no oath was administered by the p officer, I think there is an end of the question.

The accused in this case gave certain information to the P Before the Magistrate he swore that this information was The District Magistrate desired to have him punished under se 193 of the Penal Code for giving false evidence in his state made to the Police. It is suggested that he can be convicte an alternative charge of giving false evidence either in his state made to the Police or in that made to the Magistrate.

The Joint-Magistrate discharged the accused without dra up a charge or calling upon him to plead to it, on the ground, would seem, that there was no other evidence besides these two tradictory statements. The Magistrate of the District asks t quash the Joint-Magistrate's proceedings and order a re-trial do not concur with the case of the *Queen* v. *Nim Chand Mook* 20 W. R., 41. There is, as I have pointed out, no prov of law which binds a person to state the truth in answer question put by a police officer, and unless a person is legally b by an oath or by an express provision of law to state the t the offence of giving false evidence cannot be committed.

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PONTIFEX, *J.* :—I agree.

The man might possibly be tried for making a false charge, or ving false information to a public officer.

The Deputy Legal Remembrance for the Crown.

The decision of the Full Bench (1) was as follows :—

We think it plain that neither the words "shall answer all estions" in section 118 of the Criminal Procedure Code, nor the rds "shall be bound to answer all questions" in section 119 of same Code, constitute "an express provision of law to state truth" within the meaning of section 191 of the Indian Penal de.

Sections 118 and 119 are, in our opinion, merely intended to ige persons to give such information as they can to the Police in wer to questions which may be put to them; and they impose legal obligation on those persons to speak the truth, unless we part the word "truly" in each section after the word "questions", ich we clearly have no right to do.

Investigations in a Police Court are not, as a rule, conducted th the same care and accuracy as proceedings in a Court of Jus- e, and we think that it would be extremely dangerous to the erty of the subject, if information thus loosely taken by a police icer could be made the subject of a prosecution for giving false idence.

It may be, that in some cases, the giving of false information y be made the subject of a different charge under other sections the Penal Code; but this is a matter upon which we are not now lled upon to give an opinion.

(1) GARTH, *C. J.*, PONTIFEX, MORRIS, MITTER and MCDONELL, *JJ.*

[PRIVY COUNCIL.]

1880. *Nov. 16th.*

ROWVENKATA MAHAPATI

AND

MOHIPATI SURIAH

Hindu Law—Hindu female's testamentary power over Stridhan—dhan—Will—Stridhan invested in land, power of disposition ov

The testamentary power of a Hindu female over her Strid as absolute as her power of disposition over such property i lifetime, even when the fund has been derived from her husba has been invested in immovable property.

APPEAL from a decision of a Divisional Bench of the Court at Madras.

J. D. Mayne, for the Appellant.

Leith, Q. C. and *Doyne,* for the Respondent.

The facts so far as they are necessary for the purposes o report are set out in the judgment of the Judicial Committe of the Privy Council which was as follows :—

Their Lordships are of opinion that no ground has been for reversing the judgments of the Indian Courts in this case. point as ultimately stated is of the narrowest description. It mitted that upon the facts as found by the Courts it can no be disputed, that this mootah, Viraveram was purchased by the grandmother of the appellant and the respondent, out Stridhanam. Again, the testamentary power of a Hindu over such Stridhanam is admitted by Mr. Mayne to be co surate with her power of disposition in her lifetime both absolute. So far as the case would have been governed

(1) Sir James W. Colvile, Sir Barnes Peacock, Sir Montague and Sir Robert P. Collier.

sion of this Board which is reported in 192, W. R., 29, *achmun Chunder Geer Gossain* v. *Kalli Churn Singh*, but the subtle distinction which has been raised. It is sug- ed that where the funds are shown to have come wholly or art from the husband, and to have been afterwards invested in by his widow, the same law which governs in the devolution moveable estate derived from the husband is to govern that sition; but their Lordships cannot find any trace of authority pport such a distinction. It is clearly the law that from the the funds were given to the widow by the husband they be- her Stridhanam, and that she had full power of disposition them. Years after the death of the husband she chooses to t them in land. Can it be contended with any plausibility that was land which was derived from the husband? Their ships can see no ground for establishing this subtle distinction, r thus arbitrarily interfering with the power of investment and cation and disposition which the general law gives to a Hindu le over her Stridhanam. They must, therefore, humbly advise Majesty to affirm the judgments of the Courts below, and to iss this appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

1881.
April 13th.
No. 2344 of 1879.

SHEIKH KHODA BUX (DEFENDANT)..... APPELLA

AND

BUDRI NARAIN SINGH AND ANOTHER BY THEIR MOTHER AND GUARDIAN M. S. PRYABOTI (PLAINTIFFS)..... RESPOND

Limitation Act, XV of 1877, *Section* 7 *and Schedule* II *Art.* 13—*by minors—Guardians, Acts of, binding on Minors—Minority, by minors during.*

Certain property having been sold in execution of a d against the eldest of four brothers, two of whom were minors second brother made an application under Section 269 of Act of 1859, on the 18th June 1877, claiming on behalf of hi and his minor brothers, 3-4ths of the property which had taken possession of by the purchaser at the execution sale in tion, but his application was dismissed on the 9th November 1

On the 22nd January 1879, the minors through their m and guardian filed a suit to recover their shares in the proper

It was objected that the suit was barred as having been br more than one year from the date of the order under Sectio of Act VIII of 1859.

Held, that as the plaintiffs were still minors, no limitation to the suit, and that it was within time.

Per Curiam.—The right to sue is that of minors and ca Section 7 of Act XV of 1877, be exercised by them within a time from their attaining majority. The minors are bound by any act lawfully done on their behalf by a appointed guardian, but if they have a right to sue and has not been exercised on their behalf by their guardian until they are qualified to act for themselves.

Quære: As to right of appeal.

APPEAL against a decree of the Officiating Distri Purneah, dated the 15th August 1879, reversing the de Subordinate Judge of that District, dated the 15th April

1881.

SHEIKH KHODA BUX v. BUDRI NARAIN SINGH.

Statement.

The plaintiffs in this case by their mother and guardian sued) obtain a declaration of their title to, and for possession of certain nd. It appeared that a 4 anna share in the land in question ıd belonged to one Bhimraj Singh who died in 1277, leaving as is heirs the infant plaintiffs and two other sons Puhulwan Singh ıd Zemindar Singh. On the 18th May 1877, this 4 anna share as sold in execution of a decree against Puhulwan Singh alone, ıd the sale was confirmed on the 18th June 1877.

On the 21st September following, Zemindar Singh made an plication to the Subordinate Judge under section 269 of Act III of 1859 in respect of 3 annas of the 4 annas share on behalf himself and his minor brothers, alleging that he and his minor thers had been wrongfully dispossessed of their shares of the perty left by their father by the auction purchaser, and he prayed at the sale might be set aside.

The proceedings, which were pending when Act X of 1877 me into force, were disposed of under the old Civil Procedure de on the 9th November 1877, Zemindar Singh's application eing rejected.

The present suit was instituted on the 22nd January 1879.

The Subordinate Judge held that it was barred by limitation two grounds: *first*, Under section 269 of Act VIII of 1869, d Art. 13 of Schedule II of Act XV of 1877, as not being brought ithin one year from the 9th November 1877, and *second*, under rt. 12 (*a*) of Schedule II of Act XV of 1877, as being in effect a it to set aside the sale held on the 18th May 1877, not brought ithin one year from the date of the confirmation of that sale.

The District Judge held (1) that the sale was not of the annas share, but of the right and interest therein of Puhulwan ngh, and that the present suit was not one to set aside the sale, it to recover possession of lands of which the plaintiffs had been possessed by the auction purchaser; (2) that the suit being brought minors through their guardian, was not barred by limita-n. "It has been contended" he said "that the term of one ır having expired the minors cannot now sue till after they have ained the age of majority—in other words that Section 7 of Act of 1877 does not give a continuing right to sue till the latest e on which a suit may be brought under the Act. Under

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section 9 the time during which a suit may be brought mu continuous. The view put forward by the respondent s to me to be unreasonable. It implies that the minor's clai been put forward too soon, and as the Privy Council have rem it cannot be the policy of the law to postpone the trial of cl *Phoolbas Koonwur* v. *Lalla Jogeshar Sahai*, I. L. R., 1 Cal., 243 (L. R., 3 I. A., 7. The point now raised was considered, in th of *Suffurooneesa Bibee* v. *Munshi Noorul Hossein*, 17 W. R., 4 be settled by the previous decisions (7 W. R., 162 and 6 W 190) therein quoted to the effect that if a minor would have a to sue until the lapse of a certain time after he had attained ful a guardian might sue on his behalf at any time up to the d the minor's majority."

The case of *Mahipatrav* v. *Meusuk Anandrav*, 4 Bom. H. (A. C. J.), 199 was also referred to by the District Judge. A his decision remanding the case for re-trial on its merits the dant preferred this appeal.

Baboo *Taruck Nath Paulit*, for the Appellant.

Baboo *Ram Churn Mitter*, for the Respondents.

The judgment of the High Court (1) was as follows:—

In execution of a decree obtained against Puhulwan S the eldest of four brothers, Zemindar the second brother, as dian of the two youngest, minors, intervened under section of Act VIII of 1859, but his opposition was disallowed on th November 1877.

On the 22nd January 1879, Prijabutti, the mother of minors, who has since been appointed guardian in the place of Z dar, instituted the present suit on their behalf to set aside the of the 9th November 1877, and to recover possession of the p property.

The only point for our decision in special appeal is, w this suit is barred by limitation in as much as it has been b more than one year from the date of the order passed under s 269. The first Court dismissed the suit as barred, but in the District Judge has set aside this order, and remanded th

(1) CUNNINGHAM and PRINSEP, *JJ.*

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r trial, holding that as the plaintiffs are still minors, no limitation uld apply to this suit.

We are of opinion that this view of the law is correct. The ht to sue is that of the minors and can, under section 7 of Act XV 1877, be exercised by them within a certain time from their taining majority. They are, no doubt, bound by any act law- lly done on their behalf by a properly appointed guardian, but if ey have a right to sue, and that right has not been exercised on eir behalf by their guardian, it exists until they are qualified to t for themselves.

The Special Appellant's Pleader argues that Zemindar hav- g failed to sue within one year, any suit by him would be rred, and that consequently the present guardian his successor uld also be barred, though probably the minors might themselves e after attaining majority, The guardian, however, is no party a suit. The parties are the minors, and he is only their repre- ntative. The law of limitation for suits only applies to the rties themselves. The law may be different as regards appeals, cause a minor's rights are not specially excepted in this respect. , therefore, the minor's right to sue is not affected by the law of nitation, it may be exercised on their behalf by any person powered by law so to act so long as they are incapable, by reason minority, from acting for themselves. The cases of *Suffuroonessa ibee* v. *Noorul Hossein*, 17 W. R., 419 (MACPHERSON and MITTER, .) and *Hurro Sunduri Chowdhry* v. *Anundo Nath Chowdhry*, . R., 8 (JACKSON and GLOVER, *JJ.*) are in point.

We therefore dismiss this special appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

1881. *May 3rd.*

PUNNU SINGH AND OTHERS (PLAINTIFFS), ... APPELLANT

AND

Nos. 2357 to 2365 of 1879.

NIRGHUN SINGH (DEFENDANT), ... RESPONDENT

Arrears of Rent, Suit for—Act VIII (B. C.) of 1869, *Section* 14—*Rent payable for previous year—Proper rent—Res Judicata—Rent, Decree for, at particular rate whether binding for subsequent years.*

In a suit for arrears of rent for the years 1283-4-5 at the rate of Rs. 2 per bigha, it was objected that the plaintiffs had previously obtained a decree in respect of the same land against the defendant for the years 1231 and 1282, at the rate of 15 annas per bigha and that they could not now claim at a higher rate, but it appeared that in that suit the Court did not find what was the *proper* rent payable by the defendant, but had merely given a decree at the rate admitted by him to be payable.

Held, that although the decree as to the rent of the years 1281 and 1282 was binding between the parties as to the rent of those years, it in no way estopped the plaintiffs in the present suit from proving the proper rate of rent for the years 1283-4-5.

APPEALS from a decree passed by the District Judge of Patna on the 28th August 1879 confirming a decree of the Second Munsiff of that District, dated the 28th March 1879.

The plaintiffs in this suit (which was one of 10 similar suits) sought to recover arrears of rent for 1283-4-5 of certain land held by the defendants in mouzah Futtehpore Kandhra. They claimed rent at the rate of Rs. 2 per bigha. They also asked that the defendant might be ejected under section 52 of the Rent Act.

The defendant denied that his rent had ever been Rs. 2 per bigha, and insisted that the proper rent payable, and the rent which he had offered to pay, was at the rate of 15 annas per bigha. He further alleged that the plaintiffs had obtained a decree for arrears of rent at the latter rate.

It appeared that the plaintiffs formerly brought 35 suits against for the years 1281 and 1282, against the non-resident cul-

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among whom was the present defendant) of the village Futtehpur Chandhra claiming rent at the rate of Rs. 2-8 per bigha. The Moonsiff who tried the cases, disbelieving the evidence of the plaintiffs as to the amount of the jumma gave a decree, which covered all the cases, for the amount admitted by the defendants, *viz.*, 15 annas. That decree having been affirmed by the District Court, appeals were preferred to the High Court in all the cases, but they were only allowed in five, the Court refusing to hear the remaining cases because the amount at stake in each was below Rs. 100.

The five cases were remanded for re-trial on the ground that in giving a decree for 15 annas admitted by the defendants in the various suits, the lower Courts had not found what was the proper rate. On re-trial by the District Court a decree was made at the rate of Rs. 2 per bigha on the ground that the rate had been Rs. 2 previous to 1280. The District Court refused to hear reviews in the remaining 30 cases.

The defendant's case was not one of the five remanded for new trial.

In the present suit the Moonsiff held that the plaintiffs were not entitled to a decree for more than what was admitted by the defendant, and what was decreed for the years 1281 or 1282, *viz.*, 5 annas, and he gave a decree accordingly applicable to all the 10 similar suits.

The District Judge affirmed that decree—He said: "The plaintiff could not possibly have obtained, and does not say that he did obtain, a greater amount of rent than was actually decreed. This being so, that amount and no other was, in terms of section 14 Act VIII (B. C.) of 1869, the rent payable for the previous year, and the plaintiff cannot sue for more rent except after notice of enhancement, or on the strength of a new agreement."

Appeals were thereupon preferred to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Chunder Madhub Bose*, for the Appellants.

No one appeared for the Respondent.

The judgment of the High Court (1) was as follows:—

This suit is brought against the defendant for the rent of a for the years 1283, 1284 and 1285, the plaintiffs claiming at rate of Rs. 2 per bigha.

(1) GARTH, *C. J.* and MCDONELL, *J.*

1881. They say in their plaint that they are properly speaking
entitled to rent at the rate of Rs. 2-8 per bigha, but that the recov
of such higher rent depends "upon the adoption of other steps;"
which we understand them to mean that to recover the higher r
they must bring a suit for enhancement.

The answer of the defendant is this;—that the plaint
brought a previous suit against him for the years 1281 and 1
in which they claimed rent for the same jote at the rate of Rs.
per bigha: that his answer to that suit was, as it is now, that
proper rent was fifteen annas per bigha; and that in that suit
the plaintiffs failed to prove the rate of Rs. 2-8 which they clai
a decree was given in their favour for the sum which the defen
admitted, namely, at the rate of fifteen annas. The defendant
therefore that as fifteen annas was adjudged by the Court to b
between him and the plaintiffs the proper rate of rent for the y
1281 and 1282, and as nothing has occurred since to alter that
the plaintiffs cannot recover the rent which they claim in this
namely, at the rate of Rs. 2.

Both the Lower Courts have adopted the defendant's vie
the matter. They say, that in the former suit the rent was r
vered by the plaintiffs at the rate of fifteen annas per bigha for
years 1281 and 1280, and that the plaintiff cannot recover m
without bringing a suit for enhancement.

Now for the purpose of understanding rightly the effect of
judgment which was given in the former suit, we think it righ
refer to the proceedings, not only in that suit, but in five other s
which were brought at the same time against other tenants by
same plaintiff, and in which the latter claimed rent for the y
1281 and 1282 at the rate of Rs. 2-8 per bigha.

In all these suits the defendants alleged that the proper
of rent was 15 annas. The Moonsiff found that the plaintiffs
failed to prove the rate which they claimed; and that the 15 a
alleged by the defendants respectively was the proper rent.
each case he gave the plaintiffs a decree accordingly.

Appeals were then preferred in each of the cases to the Di
Judge, who affirmed the decision of the Moonsiff, but in a
equivocal form; and it is upon the language and meaning
judgment, that the question which we have now to decide
case depends.

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After considering the question, whether the plaintiffs had roved their case, and whether the proper rate of rent was Rs. 2-8, e found that Rs. 2-8 was not the proper rate. He apparently ade no enquiry, and arrived at no decision as to whether the rate lleged by the defendants was the proper one; indeed he states *that the defendants' case is very likely to be false.*" But he never-heless confirmed the decree of the Moonsiff, giving the plaintiffs n each case a decree at the rate admitted by the defendants.

He then goes on to say, "at the request of the plaintiffs' pleader I record the fact, that *I do not find as a fact, that rent has hitherto been paid at the rate alleged by defendant. I merely find that it has not been paid at the rate alleged by plaintiffs*"

That being the judgment of the District Judge in all the cases efore him, five of those cases came up on appeal to the High Court. he case against the present defendant could not be so appealed, ecause the value of the suit was not sufficient to admit of it. But e desire to refer to the judgment of the Division Bench of this ourt in the cases which were appealed, because that judgment puts construction upon the judgment of the District Judge, with which e entirely agree.

The learned Judges of this Court (JACKSON and WHITE, *JJ.*) elivered judgment in one of the appeals only, (No. 141 of 1877); d the effect of their judgment was, that the District Judge *had me to no decision at all as to what the proper rent was.*

Mr. Justice JACKSON, after stating what was the contention the plaintiff in Second Appeal, namely, that the District Judge d not found any rate of rent to be the proper one, and that he s bound to decide that question goes on to say—"The Courts are ound to ascertain as closely as they can what the real controersy between the landlord and the ryot is. On this account I hink the Lower Appellate Court ought to have ascertained, what ate of rent was payable to the plaintiffs, if the rate of Rs. 2-8 was ot payable; and as that Court has intimated something more han a doubt, whether the defendant had made a true statement f his case, I think the case must go back to the Court below, n order to a further trial of that question."

The High Court remanded the case, in order that the District ge might find, what he had not found when the case was before

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him, *what was the proper rent payable by the defendant*, and it pears that on the remand the then district Judge found, that R was the proper rent payable by the defendants for the years 1 and 1282. That being the result of the suits which were appea to the High Court, we have now to see how far the parties to t present suit are affected by the judgment of the District Judge the suit between the plaintiffs and the present defendant, which w not appealed to the High Court. Is that judgment binding up the parties to this suit, as having determined what was the prop rate of rent for the years 1281 and 1282?

We entirely agree with the learned Judges of this Court, th the judgment of the District Judge in the former suits determin nothing of the kind. His judgment is so far binding betwe the parties as regards the rent for the years 1281 and 128 that the plaintiffs could bring no other suit against the defe dant for the rent for those particular years. But as the Di trict Judge professedly *did not determine* the question between t parties, *what was the proper rent* due by the defendants for th years, we think that his judgments *no way estops* the plaintiffs this suit from proving, what the proper rate of rent was for t years 1283, 1284 and 1285. It was one thing to adjudge, that t plaintiffs should recover from the defendants as the rent for th years the sum which the defendant admitted to be due. It w another thing to adjudge, that the sum so admitted by the de dants *was the proper amount of rent due.*

We must, therefore, remand this case, and the analogous c which depend upon it, to the Moonsiff's Court for re-trial. observe that the Moonsiff appears in the Court below to have re ed in evidence the decrees which were made by the District J on remand in the other five cases *against other defendants.* clear that he has no right to do this. He is bound to try this the analogous cases upon their own respective merits and to a tain what is the proper amount of rent in each case.

The costs of this appeal will abide the result; and the gous cases will be governed in all respects by this decision.

[PRIVY COUNCIL.]

EDDA RAMAPPA NAYANWARA (DEFENDANT) APPELLANT; 1880.

AND *Nov.* 11*th.*

ANJARI SESHAMMA NAYANWARU (PLAINTIFF) ..... RESPONDENT.

Hindu Law—Succession—Elder son of Junior wife—Younger son of Senior wife.

An elder son born of a fourth wife is entitled to succeed in preference to a younger son of a third wife—even where the first and second wives have died before the marriage of the third wife.

The question how far the Institutes of Menu are to be interpreted with the aid of glosses by Commentators of authority discussed.

APPEAL from a decision passed by a Divisional Bench of the High Court at Madras.

Leith, Q. C. and *Bowring*, for the Appellant.

J. D. Mayne, for the Respondent.

The facts are fully stated in the judgment of their Lordships of the Judicial Committee (1) of the Privy Council which was as follows :—

This appeal arises in an action brought by Banjari Seshamma against his half brother, Pedda Ramappa, to recover possession of the important polliam of Banjari. Several points which resulted in issues in the Court below have been disposed of in a manner which does not render them the subjects of appeal. The facts which relate to the question which alone has been argued before their Lordship are few. It appears that Ramadasappa was the Jagar of this polliam. It had been for several centuries in his family, had been resumed by the Government, and had been restored to him, but nothing turns on that resumption and restoration. Ramadasappa married four wives; the first two wives died, without issue, before his marriage with his third and fourth wives.

(1) SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH and SIR ROBERT P. COLLIER.

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The marriage with Subbamma, his third wife and with Venkata ma his fourth wife, took place on the same day. There is now dispute that the marriage with Subbamma was prior in point time. The appellant, Pedda Ramappa, is the son of the third w the respondent Seshamma, is the son of the fourth wife Ve tamma, but was born before his half brother, Ramappa. Ram had an elder brother of the whole blood, Chandrasekhara also ju to Seshamma who upon his father's death in 1866, was put by Government into possession of the polliam. He died in the 1876 having retained possession during his lifetime. Upon death, Ramappa the appellant, was put into possession and th upon the present action was brought by Seshamma. It is necessary to mention Chandrasekhara in order to account for possession between the death of Ramadasappa the father and bringing of the action. It is conceded that this possession is material to the question which arises in this case, that que being whether the respondent, who was the first-born son of Ra dasappa though by the fourth wife, is entitled to succeed to father's estate, in preference to the appellant who was born af wards, his mother being the third and senior wife, and bein was contended, in the same position as a first married wife reason of the two former wives having died before her marri The general question as to the right of succession in the case of born of different wives was decided by this Committee in the of *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* Moore, I. A., 570. It was there held that the elder-born son, th of the junior wife, was entitled to succeed in preference to younger son born of the elder wife. In that case, however question as to the right of a son born of a first-married wife did arise, for then the mothers were both junior wives whose sons disputing the inheritance. In the present case, the first two having died before the marriage of the third and fourth wives, contended that the third wife is in the position of a first or wife, and that her son is entitled to succeed in preference to born sons of junior wives. Undoubtedly that question was open by the decision of their Lordships in the case of *Rama Ammal*. In that case it had been admitted, or was supp have been admitted that in the case of a royal wife the rule

ifferent from what it would be in the case of wives who were nior to her. Their Lordships had not to consider that ques- and did not think it right to prejudice the decision of it by any ature determination; in fact, the point was not argued. The Court of Madras, from which the appeal came, and in which dmission had been made, had also declined to decide the point. Lordships have felt some doubt whether they are now called to decide this question, for in the Court below the claim of lefendant was rested, not upon the general Hindu law, but a special family custom. The fact that his case was so rested as an admission that he and his advisers did not consider that e general Hindu law he was entitled to succeed. The custom ound against him and he did not, on his appeal to the High , insist, as one of his grounds of appeal, that by the general e was entitled, his grounds of appeal being directed only to ther points which had arisen in case, and to an allegation that ustom ought to have been found in his favour. Their Lord- , however, have allowed the point to be argued, and are pre- to determine it. The preference which has been given to the born son over his brothers, irrespective of the priority of the ages of their mothers mainly depends upon the religious rules h guide the Hindu community. It is said in the judgment in case of *Ramalakshami Ammal*, "One great rule of religion ng upon every Hindu is the duty of having a son, not only for ake of the spiritual benefits he obtains for himself by his birth, because he thereby discharges the pious debt he owes to his tors, and as a consequence naturally flowing from his law, the born son is throughout the books of authority treated as pre- ent amongst his brothers and held to be entitled to many l privileges." The principle deduced from the rule above ioned, and the reasons upon which their Lordships' judgment former appeal are founded, apply with equal force to the first- son of his father, whether born of a first-married wife or of a wife, and it certainly lies upon the appellant to show some it authority to establish the distinction for which he contends. rgument at the Bar has been rested solely upon some texts in , and those texts their Lordships think not only do not support iew contended for by the learned Counsel for the appellant,

1850.

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Judgment.

but are rather opposed to it. The material ones are few. first to which it is necessary to refer is in Chapter IX, Section 1 "By the eldest, at the moment of his birth, the father having b ten a son discharges the debt to his own progenitors the eldest therefore ought, before partition, to manage the whole patrimo This text simply says "by the eldest" without further descrip and it states that the father having begotten him has discha his debt to his own progenitors. Then the 107th is: "That alone by whose birth he discharges his duty and through whon obtains immortality was begotten from a sense of duty, all th are considered by the wise as begotten from love of pleas That section certainly does not help the contention on the pa the defendant because in the present case when Seshamma wa gotten the father had no other son, and his duty was unfulf Two other sections were referred to, which are more immedi applicable to the question under discussion. The 122nd sectic "A younger son being born of a first married wife after an son had been born of a wife last married, *but of a lower cl* may be a doubt in that case how the division shall be ma The words printed in italics are found in Sir William Jo translation. The words "but of a lower class" are no doubt i ted by a commentator and are not in the original text which come down. If the text were read without those words, undo edly that and the following sections 123 and 124 would some support to the argument of the defendant. But their L ships think that the interpolation of the commentator cann disregarded. The early versions of the laws of Menu are ancient, and it might be doing great mischief to construe the of the original text literally, unaided by the gloss which has put upon them by writers and commentators of authority, w interpretation has been received as authentic. The authori the commentator who is responsible for the interpolated wo vouched by Sir William Jones in the Preface to his transl He says "At length appeared Culluca Bhatta, who after a p course of study and the collation of numerous manuscript duced a work of which it may perhaps be said very truly t the shortest, yet the most luminous, the least ostentatious, most learned, the deepest, yet the most agreeable, comment

ased on any author, ancient or modern." Sir William Jones lf a great Oriental lawyer and scholar, says that he had almost itly followed the text and interpretation of Culluca Bhatta, ad printed his gloss in italics. It is impossible to have higher rity for an explanation of a text. Then the text is interpreted ely this, that a younger son being born of a first married fter an elder son had been born of a wife last married, but of r class, in that state of things it might be a doubt how the n should be made. Subsequent sections would seem to show n that case Menu thought the son of the first married wife have the larger share of partible property. If the interpre- is received, then the very expression "but of a lower class" o the implication that if the wives were of the same class tribution would be equal; and section 125 is to that effect:— etween sons born of wives equal in their class and without ther distinction there can be no seniority in right of the r, but the seniority ordained by law is according to the birth." s a distinct text, and the effect of it would only be uncertain ion 122 were read without the words added by the commen- It is not contended that in the present case the wives are the same class; and their Lordships do not determine what be the proper rule of succession where the wives are of a nt class or caste. That question does not arise. The only authority which has been referred to is one which certainly ot support the defendant's case, if it does not establish that plaintiff. It is the case of *Rajah Rughonath Singh* v. *Rajah ur Singh*, 7 Select Rep., 126. The marginal note correctly what the case decides: "In the case of an estate in Manbhoom jurisdiction of the Governor-General's agent at Hazareebaugh held that the succession is vested in the eldest son of the d royal born of any of his wives in preference to the eldest the paât or first Ranee." It would seem that that case was , not upon the general Hindu law, but upon the law prevail- Manbhoom, and that there was no custom to the contrary. dges who formed the majority of the Court, in their judgment, The ordinary course of succession is certainly shown by dence to be that stated by the plaintiff," that is the order

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stated in the marginal note. "To establish a contrary practi as to assume the force of family custom requires the str evidence," therefore the ordinary course of succession in the di of Manbhoom was in accordance with what their Lordships fir be the general Hindu law. The question really comes to although it was not necessary to decide in the former case l this Board what was the right of a son of a first-married wif the principles upon which their Lordships held that the first was entitled to succeed apply equally to a son of such wife and of other wives; and that being so it lay upon the defend show some positive rule of Hindu law supported either by a text or modern decision, to the contrary effect. Their Lord think that no sufficient authority for such a rule has been prod and they would observe that the reasons on which the prece and privileges of the first wife over her co-wives are founde scarcely pertinent to the succession of sons to their father, v is governed by other considerations, as already explained. ground on which this appeal has been decided renders it, of c immaterial to consider whether the third wife, who was not m until after the death of the two former wives, stood in the po of the first-married wife. On the whole, their Lordships opinion that the Court below, who concurred in their judg have come to a correct conclusion, and they will therefore h advise Her Majesty to affirm the judgments appealed from dismiss this appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

NODA PROSAD ROY, (PLAINTIFF)..... APPELLANT;

AND

VARKA NATH GUNGOPADHYA, (DEFENDANT) ..... RESPONDENT.

1881. *Feb.* 1*st.*

No. 333 of 1879.

Accounts—Agent—Civil Procedure Code, Act X of 1877, *sections* 394 *and* 395.

Procedure to be observed in taking accounts discussed.

PPEAL against a decree of the Judge of Moorshedabad, dated 13th October 1879, dismissing the plaintiff's suit as being wrongly med, without prejudice to any subsequent suit properly framed.

The facts appear in the judgment of the High Court.

Baboo *Unnoda Prosad Banerjee*, and Baboo *Hem Chunder nerjee*, for the Appellant.

Baboo *Rash Behary Ghose*, Baboo *Huri Mohun Chuckerbutty* Baboo *Kurma Sindhu Mookerjee*, for the Respondent.

The judgment of the High Court (1) was as follows :—

FIELD, *J.* :—We think that the decree of the District Judge this case cannot be sustained. It is quite possible that the intiff has not properly conceived or correctly stated in his plaint exact remedy to which he is entitled, but we think, having gard to the whole of the circumstances of the case and the inct practice prevalent in the Mofussil in this class of cases, that plaintiff ought not to be denied all remedy whatever. In his int he states (and on this point there is no dispute) that the fendant was in his employment from Assin 1282 to Joysto 1286. states further that the defendant has not submitted to him per accounts of his agency; and in the 9th para. he asks that a ree be passed to the effect that the defendant No. 1 do submit nikas papers called for, agreeably to the provisions of the kaboot executed by him. The plaint then goes on to ask that on

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failure to submit the said accounts, the defendant may be d to pay him Rs. 1,200 by way of damages. It is further a that in consequence of the defendant's negligence and misma ment he (the plaintiff) believes that he has sustained a loss c 5,000; and he asks that a decree may be passed in his favor fc sum, or in respect of such sum, as will represent the loss whicl be found by the Court to have been sustained by him.

Now some of these prayers have been wrongly conc There can be no decree for Rs. 1,200 or 5,000 Rs. o other sum, until upon taking the accounts, it has been ascer that the plaintiff is entitled to receive a sum of money fro defendant, and until it has been further ascertained wha amount is, to which the plaintiff is so entitled. That it is the of the defendant to render proper accounts to his employer, an irrespective of the stipulations contained in the kabooliut, the be no doubt. Mr. Story in para. 203 of his work on A says that:—"It is the duty of an agent, where the busin "which he is employed admits of it or requires it, to keep r "accounts of all his transactions on behalf of his principal, no "of his payments and disbursements, but also of his receipts "to render such accounts to his principal at all reasonable without any suppression, concealment or overcharge." Se Story's Equity Jurisprudence, § § 462, 468. We may add th agent does not discharge the duty of accounting by merely di ing to his employer a set of written accounts without attendi explain them and produce the vouchers by which the items o bursements are supported.

In the written statement which was filed by the defend this case, he alleged (para. 12) that the nikas papers requir the plaintiff had been prepared and submitted to him; a other parts of the same written statement, he further allege certain other accounts had been required from him within time and in such a form as rendered it impossible for him to c with this requisition of his employer.

We think that having regard to these allegations the points for enquiry in this case were, *first*, did the defendant to the plaintiff such reasonable and proper accounts of his as the plaintiff was entitled to require from him, and *second*

e defendant further explain these accounts and support them by e production of proper vouchers. We may observe that the dendant does not allege that his accounts have been settled, or that e plaintiff has expressly or by acquiescence accepted the accounts bmitted by him. If sufficient accounts have been rendered but t explained and supported in the manner above pointed out, the fendant must be called upon to explain and support them. If fficient accounts have been rendered, explained and supported, or the latter case, as soon as the accounts rendered have been exained and supported, it will then lie upon the plaintiff to point out e entries in those accounts which he alleges to be erroneous; or respect of transactions not shown in the accounts to state what onies have been received and not credited. The Judge must then oceed to deal with the questions thus raised between the parties eating each item separately.

If on the other hand no sufficient accounts have been rendered the defendant, the proper course then for the Court is that inted out in a judgment of Mr. Justice PHEAR in the case of *ud Shah Alaiahmad* v. *Musst. Bibee Nusibun*, 24 W. R.,). Mr. Justice PHEAR there says:—"The proper and convenient mode of doing so is to fix a day, before which the defendant should file a written statement of his account, exhibiting therein all the items of receipt for which he is accountable on one side and all items of disbursements on the other; and to fix another later day, before which the plaintiff should file any objections which he may have to make to these accounts when filed; and finally the Judge ought to appoint a third day upon which an inquiry into the truth and correctness of the statements of accounts filed by the defendant should be made, and on that inquiry he will take all such evidence in the way of books and vouchers and so on, as the defendant is entitled to produce as well as the testimony of necessary witnesses, and also all evidence on the part of the plaintiff tending to invalidate the accounts or to surcharge them; and eventually upon the termination of the enquiry the Judge should satisfy himself as to the amount which is due upon the account as established by the evidence of both parties and frame his decree accordingly. He ought not to give a decree for alternative damages founded upon any antecedently estimated

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"amount, which must, apart from the evidence, be simply a ma
"of conjecture or of claim. He should give no decree other t
"an order on the defendant to file his accounts, before the acco
"have been taken; and then confine his decree to such amoun
"he may find to be due upon the proper taking of the acco
"against the defendants. If the defendants prove contumac
"with regard to filing their statement of accounts, the Judge
"proceed with the taking of the accounts against them on the f
"ing of evidence furnished by the plaintiff, and in so doing he
"make all reasonable presumptions against the defendants."
also the directions to be found at page 12 of the Memorandu
Practice prefixed to the edition of the Circular Orders publishe
1876. There may be cases (and it is possible that this present
may be one) in which the taking of any account in the ma
above pointed out may occasion so great a waste of the public t
of the Judge, that resort may well be had to the provisions of
Code of Civil Procedure contained in section 394. If it be fo
advisable to have recourse to these provisions, the Judge sh
then follow the directions contained in section 395 and furnish
Commissioner with such part of the proceedings and such det
instructions as appear necessary. We think that if these direct
be carried out, there will be no greater difficulty in taking acco
in the Mofussil than is experienced on the Original Side of
Court, or in any other Court in which accounts have to be t
and settled between parties as disputatious as the parties i
present case.

We think it desirable to add that in order to enable the d
dant to prepare such accounts as the plaintiffs are entitled to re
from him, the defendant ought to have reasonable access, at p
times and in the presence of responsible persons, to such books
papers in the plaintiff's Sherista as may be necessary for the
paration of the accounts.

The case will be remanded to the District Judge in order
he may proceed in accordance with the above directions. All
in the case will follow the ultimate result.

[CRIMINAL JURISDICTION.]

' THE MATTER OF SHEIKH FAIZ ALI AND OTHERS... PETITIONERS.

1881.
March 29th.

No. 64 of 1881.

iminal Procedure Code, Act X of 1872, Section 218—Witnesses of Prosecution, Recall and cross-examination of—Procedure where accused desires to recall and cross-examine witnesses of prosecution.

The right of an accused person to recall and cross-examine the witnesses of the prosecution under Section 218 of the Code of Criminal Procedure, must be exercised at the time when the charge is read and explained to him under the preceding section, and if not exercised at that time, it cannot afterwards be insisted on—although it is in the discretion of the Magistrate to recall the witnesses if he think fit.

RULE to show cause why a conviction and sentence passed by the eputy Magistrate of Mymensingh and confirmed by the Magis-ate of the District on the 24th January should not be set aside.

In this case the Deputy Magistrate of Mymensingh on the 17th ecember 1880 upon the complaint of one Koronidi and after having amined the witnesses for the prosecution, drew a charge under ction 342 Indian Penal Code against the accused.

On the following day an application was made on petition to e Court on behalf of the accused praying that they might be lowed to recall and cross-examine the complainant and his witnesses der section 218 Criminal Procedure Code.

The Deputy Magistrate thereupon passed an order on that peti-n, which was filed the 18th December, that the matter should brought up on the following day for orders.

On the 20th December 1880, one of the witnesses for the osecution, the Constable, who investigated the case, appeared before e Court, and the Deputy Magistrate at the request of the Head lice Constable directed the mooktear of the accused to cross-amine him on that day in order to avoid the inconvenience of the nstable having to appear on another day. The mooktear declined cross-examine him on that day on the ground that he was not

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prepared to do so, as the pleader of the accused was no sent, and also because it might prejudice the defence if a witnesses were not brought up at once for cross-examination; a a petition dated the 20th December he asked that some futu might be fixed for the cross-examination.

The Deputy Magistrate declined to re-call the other wit for the prosecution on the ground that they had already cross-examined during the first hearing, and proceeded t judgment, and, finding the accused guilty under section 342 Penal Code, sentenced them to four months' rigorous imprisor and a fine of Rupees 20 each.

The Magistrate of the District by his order, dated th January 1881 confirmed the order and sentence of the Deputy M trate.

He held that the accused were precluded from re-callin witnesses for the purpose of cross-examination by reason of not having asserted their right under section 218 at the proper

A Rule was applied for and obtained from the High calling upon the Crown to show cause why the convictio sentences should not be set aside on the ground that the D Magistrate was wrong in convicting the accused without all them an opportunity to re-call and cross-examine the compl and his witnesses under section 218 of the Criminal Procedure

Baboo *Greesh Chunder Chowdhry*, in support of the Rule.

Baboo *Joy Gobind Shome, contra.*

The folowing judgments were delivered by the Court (1):

PONTIFEX, *J.*:—This Rule was moved for and granted by the ground that the Deputy Magistrate had improperly ref allow the petitioners to re-call and cross-examine the witnes complainant after the charge had been framed under secti The same objection was taken in appeal before the Magistra the Magistrate, in his decision, has held that the petitioners exercise their right, under section 218, of re-calling the for the prosecution for cross-examination within proper that therefore they were not now entitled to take any obj account of the refusal by the Deputy Magistrate to witnesses.

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Now, in the petition before us, it is stated that the charge was
vn up on the 17th of December 1880, and that *on the same day,*
pplication was made to the Deputy Magistrate asking that the
esses should be re-called for further cross-examination. It
ars, however, that the petition before the Deputy Magistrate
ng that the witnesses should be re-called, although dated on the
December 1880 could not have been filed before the 18th
mber 1880, the date on which the stamp was punched
the date on which the endorsed order was made. It ap-
that early in December the witnesses both for the com-
nant and for the accused person had been examined and cross-
nined, and on the 17th December the charge was drawn up and
Deputy Magistrate made this order: "To-day having heard
pleaders and mooktears, the case will stand over until to-
row." The ordinary inference would be that the pleaders and
ktears having been heard the case had closed and only awaited
decision of the Deputy Magistrate. But, however that may
the only rights that the accused person had, were under section
of the Criminal Procedure Code. Now, under section 217,
charge is to be read and explained to the accused person who
be asked whether he has any defence to make. That was
e on the 17th December. Under section 218, if the accused
any defence to make, he is to be called upon to enter upon the
e and to produce his witnesses, and is to be allowed to re-call
cross-examine the witnesses for the prosecution. These two
ions coming together, it seems to us that it was intended that if
accused person desired to re-call and cross-examine the wit-
es for the prosecution, the time at which he should express such
re was when the charge was read over to him and he was called
n to make his defence. That was done on the 17th December.
petition to re-call these witnesses was not put in until the
h. Therefore we think that it was no longer in the power of
accused person to insist upon his right of re-calling these
nesses although it remained in the discretion of the Deputy
gistrate to re-call them if he thought fit. Now, on the 18th
cember he made another order directing that the case should
e on again on the 20th; and on the 20th an order was drawn
but not signed directing that the witnesses should be produced

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for re-examination on the 28th. The Deputy Magistrate signed that order, for, before he was prepared to sign it, these witnesses for the prosecution, a policeman, who happe be in Court was produced, and it was asked on behalf of t secution that if the accused person wanted to cross-examir witness he should do so at once. The accused refused t examine him then, alleging that it would prejudice his case all the witnesses were cross-examined together. The Deputy trate then considered that the application for cross-examinati made only with the object of delaying the proceedings, and t was not a *bonâ fide* application; and it being under the c stances in his discretion to re-call the witnesses or not, a accused having lost his rights under section 218, the I Magistrate decided that he would not sign the order drawn he proceeded to dispose of the case.

The Magistrate, on the appeal before him, considered t Deputy Magistrate had acted with propriety, and we are d to agree with the Magistrate in that opinion. We think tha is not sufficient ground for this application, and that the Rul be discharged.

FIELD, *J.*:—I only desire to add that the vernacular shows that "the vakeels and mokhtears," that is, as I stand, the vakeels and mokhtears of both sides were exami the 17th. Now though the Code of Criminal Procedure c no express provisions similar to those to be found in the Civil dure Code as to the time at which, or the order in which the p and mokhtears for the prosecution or for the defence shall the Court, still, according to Mofussil practice, the usual prac on this point is followed. I therefore understand from the cular record that the pleader or mokhtear of the accu addressed the Court, and that the pleader or mokhtear of th secution had been heard in reply. This being so, I take the case was closed on the 17th, and the accused not having ex the right given them by section 218 at the time at whic ought if they intended to exercise it, to have expressed their tion of doing so, I think they could not afterwards claim to e that right.

[CIVIL APPELLATE JURISDICTION.]

ROSAD DAS MULLICK AND OTHERS (PLAINTIFFS), ... APPELLANTS;

AND

EDAR NATH MULLICK AND OTHERS (DEFENDANTS), ... RESPONDENTS.

1881.
March 17th.

Nos. 269 of 1879 and 14 of 1880.

ontract Act, IX of 1872, *Section* 265—*Partnership business, Winding up of—District Court—Subordinate Judge, Court of—Bengal Civil Courts Act, VI of* 1871—*Inferior Court—Jurisdiction in suits for dissolution of partnership.*

It was the intention of the Legislature in enacting section 265 of the Contract Act to create, as to the matters dealt with by the section, a new jurisdiction to be exercised exclusively by the Court of the District Judge. Accordingly in the absence of any contract to the contrary the members of a partnership or their representatives, must apply to that Court, if they desire to have the business of the partnership wound up under the provisions of the section.

[See *Luchmun Lal* v. *Ram Lal*, 8 C. L. R., 115 and *Javali Ramasami* v. *Sathambakam*, I. L. R., 1 Mad., 340, where a different construction has been put upon section 265 of the Contract Act. ED.]

Having regard to the provisions of the Bengal Civil Courts Act, VI of 1871, the Court of a Subordinate Judge is a Court inferior to the Court of the District Judge.

Per Curiam :—The presumption that the existing jurisdiction of a Court is not intended to be taken away by an enactment unless express words have been used for that purpose usually applies only to the jurisdiction of the Superior Courts.

APPEALS from a decree of the Subordinate Judge of Hooghly, ated 26th July 1879.

In these cases the plaintiffs sought, *inter alia*, to recover cerain sums of money on adjustment of partnership accounts. The rst suit referred to a period between 1276 and 1284, and to a partership in which one Kali Das was a partner; the second suit to a bsequent period from Falgoon 1284 to the termination of the

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business in 1285. In the latter case Kali Das having ceased t a partner was not made a party.

The plaintiffs' case was that the partnership business had started in 1276 in the names of Bhutto Kristo and Kedar Mullick—that they with Kali Das had an 8 anna share, the 8 annas being held by the defendants: that Kali Das left the in 1284, when a new firm comprising all the former members Kali Das was commenced.

The first business it was alleged was closed in 1285, and present suits which were laid in the Court of the Subordi Judge were to have the accounts adjusted, as to the first busin as between all the parties including Kali Das, and, as to the se business, as between the persons interested, and to have both b nesses wound up under the direction of the Court.

The Subordinate Judge dismissed the suits on the ground under section 265 of the Contract Act he had no jurisdiction t them, and from his decree the plaintiffs have preferred these app

Baboo *Troylukya Nath Mitter* and Baboo *Saroda Pros Roy*, for the Appellants.

Baboo *Hem Chunder Banerjee* and Baboo *Guroo Dass Ban* for the Respondents.

The judgment of the High Court (1 was as follows:—

These two cases are connected, have been argued together, may be disposed of by a single judgment. In No. 269 it is all in the plaint that the plaintiffs and the defendants carried on b ness in rice at Chandbally, Hooghly and other places from Jo 1276 (1869) to 23nd Falgoon 1284 (5th March 1878); and plaintiffs and defendant No. 3, Kali Das Mullick had an anna share in this business, the other moiety or eight anna s belonging to defendants 1 and 2, Kedar Nath Mullick and Rus Lall Mullick; that on the 5th March 1878, defendant No. 3, Das Mullick went out of the business and the partnership therefore dissolved; and that the plaintiffs and defendant N Kali Das Mullick, as between themselves, were entitled to anna and a two anna share respectively. They therefore ask the accounts may be adjusted, in other words that the partne

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may be wound up, and that Rs. 5,500 or whatever larger sum may be found to be their share of the profits may be awarded to them by the Court. They further ask a sum of Rs. 1,000 as damages incurred in consequence of the defendants having withdrawn the large sum of Rs. 13,000 from the business and so crippled it. This last claim is, however, concerned with the second business, which forms the subject of the second suit; and when, according to the direction of the Subordinate Judge, the cases were separated and a separate plaint filed in respect of the second business, this claim of Rs. 1,000 should have been transferred to such second plaint.

The second appeal No. 14 of 1880 relates to the second business conducted by the same persons. It is alleged that this business was commenced on the 23rd Falgoon 1284 (6th March 1878); that the plaintiffs and defendants were partners therein and that the plaintiffs had an eight anna share; and the defendants Kedar Nath Mullick and Russick Lall Mullick, the other eight anna share. It is not distinctly alleged that this second business has been closed, but the cause of action is dated from Bysack 1285, when certain arbitrators were appointed to settle disputes between the parties, and it would appear that this was a virtual dissolution of the partnership. The plaintiffs here ask, *first*, that the accounts be settled, or in other words that the partnership may be wound up; and *secondly*, that Rs. 1,100, or whatever larger sum may be found to be their share of the profits may be awarded to them by the Court. To this case also belongs the further claim for Rs. 1,000 as damages incurred in consequence of the withdrawal of Rs. 13,000 from the business, and these damages are claimed as compensation for the probable profits which the plaintiffs would have obtained from the continued employment of this amount of capital. The Subordinate Judge has held that he had no jurisdiction to entertain and decide these suits, and that with reference to section 265 of the Contract Act, the Court of the District Judge has exclusive jurisdiction to deal with the questions raised in this litigation. Section 265 of the Contract Act is as follows, "In the absence of any contract to the contrary, after the termination of a partnership each partner or his representatives may apply to the Court to wind up the business of the firm, to provide for the payment of its debts and to distribute the surplus according to the shares of the partners respectively."

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Then comes the following Explanation. "The 'Court' in t section means a Court inferior to the Court of a District Ju within the local limits of whose jurisdiction the place or princ place of business of the firm is situated." Now the first quest which has been argued before us, is that the Court of the Subordin Judge is not a Court inferior to the Court of a District Judge; b we think with reference to the Bengal Civil Courts Act, VI 1871, that this contention is wholly untenable. The Court o Subordinate Judge is inferior to the Court of a District Judge least in two important particulars. So far as regards suits of certain value, that is suits not exceeding Rs. 5,000, the Court the District Judge has an appellate jurisdiction over the Court the Subordinate Judge. Then by the express provisions of t Civil Courts Act (section 11) all the Civil Courts in the Distri and therefore the Court of the Subordinate Judge, are subject to t control of the District Judge. We are therefore of opinion th the Court of a Subordinate Judge is inferior to the Court of a D trict Judge within the meaning of the above explanation.

Then it is argued that the words "may apply" are permiss only, and that their effect is to give to the District Judge a c current jurisdiction merely; but this argument assumes that bef the passing of the Contract Act, the jurisdiction provided by secti 265 of that Act existed and could be exercised by some other Co or Courts than that of the District Judge; but we think that t was not the case.

Undoubtedly the reports of cases decided before the passing the Contract Act do shew many instances in which members business partnerships resorted to the Civil Courts in order to h accounts and other matters settled between them by judicial decis and in this, as in other matters, the selection of the Court was regula by the pecuniary value of the subject matter of dispute; but we app hend that no tribunal existed out of the Presidency towns which capable of exercising the exact jurisdiction conferred by section of the Contract Act, capable, in other words, of dealing with p nership matters for all purposes contemplated by this section. the case of *Julius* v. *The Lord Bishop of Oxford*, L. R., 5 Cas., 214 it was held that the words in a statute "it shall be ful," of themselves, merely make that legal and possible, which

ld otherwise be no right or authority to do, and that their natural ning is permissive and enabling only. A somewhat similar may be given to the word "may;" and in this view the words y apply" in section 265 of the Contract Act create a new diction; and if this is so, according to the usual rule, that diction must be exercised strictly in accordance with the pro- ns of the Statute which creates it. In other words the juris- on created by the section must be exercised exclusively by a t not inferior to the Court of a District Judge within the local s of whose jurisdiction the place or principal place of business e firm is situated. Let us then see what is the jurisdiction rred by section 265. It is a jurisdiction, *first*, to wind up the ess of the firm; *secondly*, to provide for the payments of its s, and, *thirdly*, to distribute the surplus according to the shares e partners respectively. The next question which arises is this. efore the passing of the Contract Act the Civil Courts other the Courts of the District Judge had jurisdiction to deal with one of these matters has that jurisdiction been taken away in e cases in which the parties, who seek the assistance of the ts, do not desire a settlement of all these matters. In the nt cases there are distinct prayers that the first and third of bove objects may be carried out by the Court; and it is argued inasmuch as the plaintiffs do not ask that any provision be for the payment of debts, the case does not require the exer- of the jurisdiction conferred by the Act; and there is therefore ing to prevent the ordinary Courts, according to their respec- limits of pecuniary jurisdiction from entertaining and dealing questions of account or other questions arising between part- for the settlement of which it is not necessary to carry out whole of the three objects contemplated by the section of the ract Act.

Now, in the first place it is a settled principle that a separate by one partner against another partner will not lie unless ause of action is so distinct from the partnership accounts as involve their consideration.

In the present cases it is clear that the plaintiffs can have no without an adjustment of the accounts. Whether the plain- are entitled to the sums of money claimed by them as a share

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ment.

of the profits, or to any sum of money as profits cannot be kn until the whole of the partnership concerns and accounts have b fully examined. Even if there are no debts to be paid, it is nec sary to consider the agreement under which the partnership entered into, the amount of capital contributed by each part the share of the profits to which each is entitled, the sums wh he has received, the losses and expenses and other matters, bef it can be settled what any member is entitled to have from surplus. Then suppose that there are debts, it is true that plaintiffs have not expressly asked that the debts of the f may be discharged; but until those debts have been paid, i impossible to say that any portion of the money which may found to be to the credit of the firm, can be handed over to partners as profits. It may well have been the intention of Legislature that any remedy which the members of a dissol partnership are entitled to claim through the medium of the Co of Justice, should be subject to this condition that all persons hav just claims upon the partnership should have those claims fir discharged.

With respect to the claim for damages, which is a very unu claim, until the partnership accounts have been settled, it is possible to know whether the Rs. 13,000 alleged to have b withdrawn from the business was an unreasonably large sum take in the shape of profits at the time when the amounts wh make up this sum were withdrawn.

After the best consideration that we can give the subjec appears to us that it was the intention of the Legislature in en ing section 265 of the Contract Act to create a new jurisdic to be exercised exclusively by the Court of the District Judge; that in the absence of a contract to the contrary, the members partnership or their representatives can have no remedy such a asked in the present case, except by resorting to that Court, wh is by the section of the Act authorized to deal fully and finally w all questions, the settlement of which is necessary in order to complete winding up of the business of the firm.

We may observe in conclusion that the presumption that existing jurisdiction of a Court is not intended to be taken a unless express words have been used for that purpose usually ap

1881.

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Judgment.

only to the jurisdiction of the superior Courts. Unless the jurisdiction of a superior Court is expressly and clearly taken away, such jurisdiction will be presumed to continue. In the present case the jurisdiction which will be ousted if the Court of the District Judge is held to have exclusive jurisdiction in partnership matters, is the jurisdiction of Courts inferior to that of the District Judge; and, so far as we are aware, the presumption to which we have now referred is not usually applied in the case of such inferior Courts.

Having regard to all the circumstances of this case, and to the fact that the provisions of the section of the Contract Act are new and of not unmistakably clear meaning, we think that the plaint in these cases should be returned for the purpose of being presented to the District Judge. The Subordinate Judge will follow the provisions of section 57 of the Code of Civil Procedure in carrying out this order. The plaintiff must pay the costs of the defendants in this and the Subordinate Courts.

[CIVIL APPELLATE JURISDICTION.]

NILMONEY SINGH DEO (DECREE-HOLDER) ..... APPELLANT;

AND

RAMJEEBUN SURKEL (JUDGMENT-DEBTOR) ..... RESPONDENT.

1881.
March 4th.

No. 291 of 1880.

Limitation Act, XV of 1877 *Schedule II Art.* 179 *cl.* 4.

The application mentioned as a starting for a period of limitation in Art. 179 cl. 4 of Schedule II of the Limitation Act, XV of 1877, must be an application in accordance with law, that is, an application made within the prescribed period.

APPEAL from an order passed by the Judicial Commissioner of Chota-Nagpore on the 18th June 1880, affirming an order of the Deputy Commissioner of Manbhoom.

1881.

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Judgment.

An application for execution of a decree dated 12th Febru 1873 was made on the 12th Feburary 1874. This application w subsequently on the 16th August 1874 struck off. A seco application for execution was made on the 16th February 18 three years and 4 days after the previous application.

On a further application being now made, the Deputy Co missioner held it to be barred in as much as the previous app cation was itself barred and did not create a fresh starting point.

The order of the Deputy Commissioner having been confirm on appeal, this second appeal was preferred by the decree-hold to the High Court.

Baboo *Kali Mohun Dass* and Baboo *Bhobany Churn Dutt*, f the Appellant.

Baboo *Bama Churn Banerjee*, for the Respondent.

The judgment of the High Court (1) was as follows:—

The application mentioned as a starting point for a period limitation in Art. 179 cl. 4 of Schedule II of the Limitation A of 1877, must be an application "in accordance with law." this case the application of February 16th 1877 from which it contended that the period should be computed was not "in acco ance with law" as it was made after the date prescribed by the l then in force. It cannot therefore constitute a fresh starting poi for limitation. The appeal is dismissed with costs.

(1) CUNNINGHAM and PRINSEP, *JJ.*

[PRIVY COUNCIL.]

HOOBUNESWARI DEBI (ONE OF THE DEFENDANTS), ... APPELLANT ; 1880. *Nov. 12th.*

AND

URRI SARUN SURMA MATRO (PLAINTIFF), RESPONDENT.

Evidence—Secondary Evidence of Deed—Original Deed, Search for.

In a suit to recover a share of joint family property, the defendants relied upon a deed of *Anumati patro*, alleged to have been executed in 1826 by the ancestor of the joint family, distributing the property in a manner different from that in which it would have been distributed by law.

This deed had been filed in proceedings in 1832 and 1837 on behalf of a member of the family, and again in 1857 on behalf of A, one of the defendants in the suit. It appeared that the original deed was, in 1857, given back to A.'s mukhtear on his receipt. Secondary evidence was given of the deed, but there was nothing to show that any endeavour had been made to obtain the original from the custody of A.'s mukhtear.

Held, (affirming the decision of the High Court) that the original deed had not been sufficiently accounted for, and that therefore secondary evidence of its contents was inadmissible.

HIS was an appeal from a decree of a division Bench (PHEAR d MORRIS, *JJ.*) of the High Court at Calcutta, dated the 22nd c. 1874.

Doyne, for the Appellant.

C. W. Arathoon, for the Respondent.

The facts sufficiently appear from the judgment of their Lordps of the Judicial Committee of the Privy Council (1) :—

The facts necessary to the understanding of this case are follows :—Romanath Lahira, who died in October 1831, had sons and left a widow, who died in the year 1849. One of sons Roghoomoni, died in 1842 leaving his widow and heiress

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1880.

HOOBU-ESWARI DEBI v. HURRI PRASUNNA SURMA LATRO.

Judgment.

Chundramoni, who died in October 1858 leaving Uma So heiress to her father; she was the plaintiff in this suit. H has been since substituted, but it will be convenient to tre as the plaintiff. She sued as defendants, three members o family, *viz.*, the widow of Sibnath, the youngest son of Lahir died about May 1861, having been the manager of the pr from his father's death to that time, Nilcomul, who was of the third son of Romanath Lahira and Konuk Tara, the of the eldest son of Romanath Lahira. Neither Nilcom Konuk Tara appear in this appeal, the only appellant being buneswari, widow of Sibnath. The claim of the plaintif in right of her father to a fifth share of the property of her father and of the accretions to that property which had quently accrued during the management of Sibnath. reference to the property left by the grandfather she ad that she had been in possession for some time of a two annas Therefore she only claimed the difference between that two share and the fifth, that is to say, 1 anna and 4 gundas With respect to the rest, the subsequent accretions, she claim fifth, being 3 annas and 4 gundas. It has been found by Courts that these accretions consisted of acquisitions ma Sibnath out of the family property, and not, as he contende of his separate funds, and therefore they became part of the property, the family remaining joint, as has been found b Courts, until the death of Sibnath. The main defence claim of the plaintiff consisted of two deeds set up by the dants. The first is called a deed of *Anumati patro* alleged t been executed by Romanath Lahira in 1826, wherein he distribution of his property somewhat different from that would have been made by the law. According to the alleged by the defendant he retained a 3 annas share of t perty for himself; he gave a three annas share of it to hi son, and a 2½ annas share to each of his four younger so therefore, under that deed it was contended by the de that the share of the plaintiff instead of being to a only a 2½ annas share. It was further contended that moni the mother of the plaintiff during her widowhoo 1856, had executed another deed whereby she had sold t

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BHOOBU-NESWARI DEBI v. HURRI SARUN SURMA MAITRO.

Judgment.

of her 2½ annas share, that is a ½ anna share, in consideration oney advanced by Sibnath, and of Sibnath having, as was alleg- y the deed, paid a portion of his father's debt out of his own pro- r. With respect to this deed the findings of the Court are as fol- :—The Judge of first instance doubted its execution by Chundra- ; he thought that if executed, the execution was obtained from y fraud and coercion, and he was further of opinion that no con- ation for it had been proved. The High Court agreed with him, events on the latter point, and the result is that by the judgment o Courts on what is a question of fact, that deed has no vali- and may be at once disposed of. The two Courts differ with ct to the first deed, the Judge of the first instance holding that eed had been properly proved, that is to say, that secondary nce of it was admissible and had been sufficiently given the itself not being produced. The High Court were of opinion in rst place that the original deed had not been sufficiently account- r to admit secondary evidence of its contents, and secondly, that ondary evidence were admissible, satisfactory secondary evi- had not been given. It is necessary therefore to enquire how ase stands with reference to this deed. Their Lordships can tain little or no doubt that a deed of the description which the dants allege was executed by Romanath Lahira. Such a deed ferred to in some judicial proceedings. It is referred to in a eding in the year 1832 whereby it appears to have been filed e Kashinath Maitra who then acted as a solicitor for some of embers of the family. It is also shown to have been filed 37 by the same person and returned to him. It further ap- that what may be assumed to be the same deed was filed in ourt of Goalpara in 1857 by Ramattum Mullick who acted on of Konuk Tara widow of the eldest son and one of the defen- in this suit, though said to be only *pro forma* a defendant. It rs that Ramuttum Mullick, who was the mooktear of this lady, ed a copy of this deed, and further that he got back from the the original and signed a receipt for it on the 7th December There may possibly be a question whether Mullick was or ot authorized to act on behalf of this lady, but it appears to Lordships that, whether he was or not, the custody of the deed rably well shown. If Mullick acted on behalf of the lady,

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Judgment.

the presumption would be that he returned the deed to her. If I did not act on her behalf, it is shown to be in his custody, and h not been shown to have come out of it. Under these circumstanc it appears to their Lordships that the very first duty of the defend was to endeavour to obtain the deed from the custody either Ramattum Mullick or of Konuk Tara one of the defendants. But attempt whatever appears to have been made to obtain it from eith them, or even to inquire whether or not it was in their custody, o whose custody it was. In short no search for it or inquiry resp ing it of any kind has been shown. Under these circumstances the law of this country which has been in a great measure, w respect to deeds, made the law of India, it appears to their Lordsh that the first condition of the defendants' ability to give second evidence, *viz.*, the accounting for the non-production of the ori nal—has not been complied with, and on that ground they are opinion that the judgment of the High Court was right, and t secondary evidence was not admissible. That being so, it is n necessary to determine whether, if secondary evidence was adm sible, the evidence given was sufficient. Their Lordships do n however, desire to indicate any difference of opinion between the selves and the High Court on this subject. It has indeed b further argued by Mr. Doyne, that the general conduct of the fa ly shows that a family arrangement such as is contained in t deed was acted upon and recognized by the family. But whate arrangement there was according to this case was under a deed at the most the evidence which he relies upon, the conduct of family, could have no greater effect than to corroborate the se dary evidence of the contents of the deed, if secondary evid were admissible. The only other aspect in which the condu the family could be held to be material would be with respe the application of the Statute of Limitations. That conduct to to show that there had been a partition beyond the Statu period. But here again there is a finding of two Courts that was no division of the family until May 1861 within the per limitation. Under these circumstances their Lordships a opinion that the judgment of the High Court was right, an will humbly advise Her Majesty to affirm that judgment dismiss this appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

URNOMOYI DASSIA AND ANOTHER (DEFENDANTS) APPELLANTS;

AND

AND MORTGAGE BANK, LD., (PLAINTIFF) ... RESPONDENT.

1881.
March 4th.

No. 1790 of 1879.

Regulation VIII of 1819 *section* 17 *cl.* 5—*Sale of putni for arrears of rent—Durputni, Decree for Compensation for loss of, by sale of putni—Attachment of surplus sale proceeds—Priority.*

The plaintiff having obtained a decree upon a mortgage of a putni tenure, the tenure was, on the default of the putnidar, sold for arrears of rent, and the surplus proceeds after satisfying the superior landlord's claim were at once attached in execution of the decree. Within two months, however, of the sale, but subsequently to the attachment, the durputnidar whose tenure had been destroyed, under cl. 5 of section 17 of Regulation VIII of 1819, sued the putnidar for compensation for the loss and obtained a decree which was directed to be paid out of the surplus proceeds. The amount of the decree having been paid as directed, the plaintiff filed the present suit to recover the amount so paid on the ground that, as his attachment was prior to the suit of the durputnidar, he was entitled to the whole of the surplus proceeds, which did not cover his decree, to the exclusion of the durputnidar.

Held, that as a claim to the surplus proceeds could only be put forward by a *regular suit* under cl. 5 of section 17 of Regulation VIII of 1819, the attachment of the plaintiff was not sufficient, and the plaintiff was therefore not entitled to succeed.

APPEAL from a decree passed by the District Judge of Jessore, ated the 12th May, modifying the decree of the Subordinate Judge f that District.

The plaintiff in this case held a mortgage, dated 1279 under hich was included a putni talook named Deolee Meethapore held r one Doorga Churn Saha. In 1275 Doorga Churn granted a dur-tni to the defendant Surnomoyi Dassia the wife of the defendant mbica Churn Bose. In 1283 the putni was sold for arrears of nt and a sum of Rs. 2,100 was left in deposit after satisfying

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Judgment.

the superior landlord's claim. In 1874 the plaintiff had obtained decree upon the mortgage, and in execution of that decree attach the money in deposit.

A suit was then instituted within 2 months of the sale, und cl. 5 of section 17 of Regulation VIII of 1819 for Rs. 741 f compensation for the loss of the durputni. It was admitted th Rs. 741 had been paid for the durputni. A decree, which w costs amounted to Rs. 865, was granted, and as directed, amount of the decree was paid out of the surplus proceeds.

The plaintiff then sued to recover back the amount paid the ground that by reason of the attachment he had a prior ch to the whole amount in deposit as it did not cover the amoun his mortgage decree.

The Subordinate Judge held that plaintiff was not entitled any priority.

On appeal the District Judge held that under cl. 4 of s tion 17 of Regulation VIII of 1819 the interest of the plain through the mortgage from the putnidar entitled him to sh in the surplus proceeds rateably with the durputnidar. He accor ingly directed that the durputnidar and the plaintiff should be p out of the fund in the proportion of Rs. 865 to Rs. 2,000. T latter sum being the extent to which the plaintiff's claim, wh was over Rs. 50,000, was taken as secured by the talook, the mo gage being spread over other properties.

The defendants appealed against the decree of the Dis Judge, and the plaintiff filed cross objections.

Baboo *Moti Lal Mookerjee*, for the Appellants.

Baboo *Kashi Kant Sen*, for the Respondent.

The judgment of the High Court (1) was delivered by—

GARTH, *C. J.* :—We think that the District Judge has tak erroneous view of this case.

The suit was brought by the Land Mortgage Bank again defendants to establish their right to a sum of Rs. 865-5-9, had been obtained by the defendants Nos. 1 and 2 under circumstances.

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GARTH, *C. J.*

The putnidar of a talook had granted a durputni of it to the defendant No. 1 on the 31st of Magh 1275.

The same putnidar then mortgaged to the Land Mortgage Bank this talook and other properties on the 8th of March 1872, for a sum of Rs. 45,000.

On the 28th September 1874, the Bank obtained a decree for the sum due to them upon this mortgage, and declaring their rights under it.

The putnidar having then made default in payment of his rent, the talook was put up and sold by auction for its own arrears on the 7th of November 1876; and after paying the rent and all expenses, there remained a surplus of the sale proceeds in the hands of the Collector of Rs. 2,138-1-5.

By means of this sale the durputnidar, the defendant No. 1, lost his durputni; and therefore on the 12th of January 1877, the defendants Nos. 1 and 2 (the latter being the wife of the defendant No. 1) brought a suit against the putnidar (under the provisions of cl. 5 of section 17 of Regulation VIII of 1819) to recover compensation for the loss of the durputni, and to have the amount of the compensation paid to them out of the said surplus proceeds; it being alleged, that the durputni was purchased with the money of the defendant No. 2.

In this suit the defendants Nos. 1 and 2 obtained a decree for the sum of Rs. 865-5-9 by way of compensation, and the Moonsiff ordered that sum to be paid to them out of the surplus proceeds.

Meanwhile, immediately after the sale of the putni, the Land Mortgage Bank had placed an attachment upon the sum of Rs. 2,133-1-5 the surplus proceeds; but the Collector, notwithstanding this attachment, allowed the defendants Nos. 1 and 2 to obtain the Rs. 865-5-9 out of the surplus proceeds in accordance with the Moonsiff's order.

This suit was then brought on the 28th of March 1878 by the Bank for the purpose of recovering the Rs. 865-5-9 from the defendants Nos. 1 and 2, and they contend, that as their attachment was prior to the suit of the defendant Nos. 1 and 2, they are entitled to the whole surplus proceeds to the exclusion of the defendants' claim.

The view of the Subordinate Judge was, that the two defendants had a right to bring their suit for the sum which they

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Judgment.

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obtained, and that it was properly paid over to them out of t surplus proceeds. He therefore dismissed the plaintiff's suit.

The District Judge took a different view. He considered th the case came within the provisions of section 17 of the Regulatio but he thought that the plaintiffs had an equal right with t defendants Nos. 1 and 2 to the surplus proceeds, as being assign of a valuable interest in the talook; but that as the sum was n sufficient to satisfy both, he decided that the surplus proce ought to be divided between the parties rateably in proportion the value of their respective interests in it. Putting therefore value of the plaintiff's interest at Rs. 2000, and that of the def dants at Rs. 865-5-9 he held that the defendants were entitled Rs. 550 out of the surplus, and the plaintiff to the residue. therefore gave the plaintiff a decree of Rs. 315, and ordered e party to pay his own costs.

Both parties complain of this decision; the plaintiff (by w of appeal on the ground, that the defendants were not entitled any part of the surplus proceeds; and the defendants (by way cross objection) on the ground, that they are entitled to the wh of the Rs. 865-5-9, and that the Court below was wrong in dir ting them to restore Rs. 315 to the plaintiffs.

It is strange, that during the whole of the argument in t Court we have been allowed to remain under a wrong impres as to a point, upon which, as it seems to us, the whole case tu We were led to suppose, that the suit brought by the defend in which they recovered the Rs. 865-5-9 was not brought w *two months from the time of the sale of the putni*; and if that been so, we think that the moonsiff would have had no p to order that sum to be paid out of the surplus proceeds.

The words of cl. 5 of section 17 are: "It shall be co "tent to any one conceiving himself to possess such an int "&c. to bring forward his claim to the price he may have pa "the same, or for a just compensation for the loss sustain "him in consequence of the sale, *by instituting a regular suit* "*time within two months from the date of sale.*"

If therefore the suit of the defendants had not been br within 2 months from the date of sale, the moonsiff, al he might have given them a decree enforceable in the

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ay, could not have decreed the amount out of the surplus roceeds.

It now turns out, however, that the suit was brought duly ithin the two months, and that therefore the moonsiff's decree as quite regular.

That being so, the only question is, whether the plaintiff, ho had placed an attachment upon the surplus proceeds imme- iately after the sale, is entitled to recover from the defendants the hole or any part of the sum which has been awarded to them out f those surplus proceeds by the moonsiff.

It has been suggested to us that although the plaintiff did not ring any suit under cl. 5 of section 17, yet he must be con- dered as having made a claim to the surplus proceeds by placing attachment upon them. But that is a course, which appears to s not to be warranted by cl. 5. The only claim which can be ade under cl. 5 is *by a regular suit*, and the decree which is to made in that suit is of a special nature, *enforceable only as gainst the sale proceeds*; and if the plaintiff in this suit had in- nded to proceed against those proceeds under cl. 5 he could ly have done so by instituting a regular suit.

This he has not done; and as the defendants have taken e proper course, and have obtained a judgment, we think that ey have secured a right to the sale proceeds to the amount of eir judgment prior to any right of the plaintiff.

It may be, that the plaintiff may enforce their attachment as gainst the residue of the sale proceeds; but that question does t arise in this suit.

The result is, that the judgment of the District Judge must reversed, and that of the Subordinate Judge restored; and that e plaintiff must pay the costs in all the Courts.

[PRIVY COUNCIL.]

1880.
Nov. 19*th*.

AGRAWAL SINGH AND OTHERS, (PLAINTIFFS)... APPELLANTS;

AND

FOUJDAR SINGH AND OTHERS, (DEFENDANTS)... RESPONDENTS.

Evidence—Burden of Proof—Estoppel—Conduct of parties—Registration in Collectorate.

In a suit to recover possession of certain land and houses, w which the plaintiffs rested their claims on the allegation that whe the succession opened out they were seventh in degree, whereas th defendants were eighth in degree, from a common ancestor an were entitled to no part of the property, it appeared that imm diately after the opening out of the succession, the plaintiffs had trea ed the defendants as having equal rights with themselves and as bein in an equal relationship to the common ancestor and had permitte their names to be registered as such in the Collector's books.

Held, (affirming the decree of the High Court at Allahabad) th the course of conduct of the plaintiffs although not amounting an estoppel in point of law threw the burden upon them of provi the allegation on which they rested their claim.

APPEAL from a decree passed by the High Court at Allah bad.

The facts are fully set out in the judgment of their Lordships the Judicial Committee (1) of the Privy Council which was follows:—

This was a claim on the part of the plaintiffs who are app lants, to a certain portion of the property, consisting partly of talook and partly of houses, of one Duswunt Singh, to whom th alleged that they were heirs. The case presents itself in this pect: The plaintiffs allege that they, and the persons constituti

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er branch of the family, whom they make what is called *rmâ* defendants, are each entitled to half of the property of unt Singh, who died in the year 1833, leaving a widow, a Koer, who died in 1864, whereupon the succession to unt Singh's property opened to his next heirs. The plaintiffs' to heirship rests upon the assertion that they, together with *o formâ* defendants, were seventh in degree from a common or when the succession opened, and that the real defendants, spondents, were eighth in degree, and therefore took no part property which Duswunt left. The respondents allege that aintiff and the *pro formâ* defendants, as well as they themwere removed an eighth degree from the common ancestor, at, therefore, each class took one third of the property. But uestion again narrows itself to a smaller point. It is agreed h parties that one Munsa Singh was in the fourth degree the common ancestor. If the plaintiffs are right in their on that their grandfather, Sheo Churn Singh, was the son nsa Singh, they are in the seventh degree; and if the grandof the *pro formâ* defendants, Lal Singh, was also a son of Singh, the *pro formâ* defendants are also in the seventh . But if the respondents are right in their contention that Singh, instead of having three sons, Sheo Churn Singh, gh, and one Nowidh Singh, (from whom they, the respon- are descended) had three sons named Mahesha, Sheo Dutt, widh, and that Sheo Churn Singh, and Lal Singh were the spectively of Mahesha and Sheo Dutt, and therefore the ons instead of the sons of Munsa Singh, then the respondents ht in contending that the plaintiffs the *pro formâ* defendants, emselves are all in an equal degree. So that the question o this, so far as the issue is concerned between the plaintiffs respondents, *viz.*, whether Mahesha existed, or whether the has been, as the plaintiffs contend, interpolated into the e by the respondents. The course of the suit was this. The fs sued in 1875, eleven years after they allege that their right upon the succession opening on the death of Nagina Koer. he case coming before the Subordinate Judge he thought plaintiffs' evidence on the question which has been stated ter than that of the defendants: in other words that Sheo

r to determine the case. The first and main consideration t the plaintiffs undoubtedly admitted the rights of the defen- immediately after the opening of the succession, and acted that admission by permitting the name of the defendants to istered in the Collector's office and by carrying on suits with in the joint names of all. In short, they appear not to have y respect disputed the defendants' title until about eleven after the opening of the succession. This course of conduct, gh it does not amount to an estoppel in point of law, throws the plaintiffs a heavy burden of proof, which, in their Lord- opinion, the plaintiffs have not sustained. Without going gth into a discussion of the evidence, it is to be observed that e first instance the plaintiffs scarcely made any attempt to their alleged pedigree. They put in a pedigree without g any evidence of a satisfactory character to support it or to rt what is their main proposition, that their grandfather Churn Singh, was the son of Munsa Singh. On the second on the evidence does not appear to have been much more actory. They did indeed call a lady, Narbansi Koer, who had ed out of the family, and she gave some evidence in favour ir pedigree, but it appears that this lady had not been alto- r accurate on this subject on a former occasion, although there be no reason to suppose that she spoke what she did not be- to be true. It is to be observed, however, that neither of the rincipal plaintiffs, Agrawal Singh and Huri Singh, being both onsiderable age apparently upwards of seventy, if not eighty of age—has come forward to support their own pedigree, or , what would have been admissible in this case, that he had from any members of their family that their grandfather, Churn Singh, was a son of Munsa Singh, or that Munsa was their great-grandfather, or that no person of the name ahesha had ever been heard of. No evidence of that kind was . On the other hand, the defendants did call an old member family, Ram Dyal Singh, one of the *pro formâ* defendants who against his interest, or at the least was a disinterested witness. was of the age of 83, and gave some evidence, which the High treated as important, in favor of the pedigree of the defen- which includes Mahesha, who is therein described to be the

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son of Munsa Singh, although he admitted that his pe knowledge did not extend beyond Sheo Churn Singh, and th that he said with regard to the state of the family before his depended upon hearsay. Their Lordships are not prepa decide that the High Court was wrong in giving credence to thi dence. These circumstances appear to their Lordships strongly cline the balance in favor of the judgment of the High Court this being so, they will humbly advise Her Majesty that the ment of the High Court be affirmed, and that this appeal be dis with costs.

[CIVIL APPELLATE JURISDICTION.]

1881.

March 3rd.

No. 279 of 1880.

NARAIN SINGH (DEFENDANT) .... APPELL

AND

BHEURAB CHURN PANDA AND ANOTHER (PLAINTIFFS) ..... RESPON

Civil Procedure Code, Act X of 1877, *Section* 558—*Appeal, App for Re-admission of—Reasonable Cause.*

On an application under Section 558 of the Code of C cedure for the re-admission of an appeal which had been *ex-parte* against the applicant, it appeared that he had bee by reason of the appeal having been transferred from the fi Court to another, no notice of the transfer having been him by the pleaders in the case.

Held, that under the circumstances the applicant was to have the appeal re-admitted.

APPEAL from an order passed by the Subordinate Manbhoom.

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Judgment.

In this case the petitioner who was defendant in a suit which as brought against him at Manbhoom and decided against him, referred an appeal to the Judicial Commissioner of Chota-Nagpore.

That appeal, it appeared, was transferred from the file of the idicial Commissioner to that of the Deputy Commissioner of anbhoom on the 14th November 1878, and was dismissed on e 10th December 1879, in the absence of the petitioner who now plied to have the appeal re-admitted under section 558 of the de of Civil Procedure. He stated in his affidavit that his eaders had not given him notice, and that he was not aware of e transfer which had been made.

The application was refused on the ground that the pleaders the petitioner ought to have given notice of the transfer and that he were damnified by their neglect in not having given such tice, he had a right to sue them for negligence.

Against the order of refusal this appeal was preferred.

Baboo *Jogesh Chunder Dey*, for the Appellant.

Baboo *Opendro Nath Mitter*, for the Respondents.

The following judgments were delivered by the High urt (1) :—

CUNNINGHAM, *J.* :—We think that this case is one in which the dulgence given by the Code of Civil Procedure might very well ve been allowed.

The order of the Lower Court is set aside and the Subordinate dge directed to hear the appeal.

The appellant is entitled to his costs.

PRINSEP, *J.* :—The Sudder Judge was, in my opinion, wrong refusing to re-admit this appeal as the appellant had clearly own that he had been misled.

(1) CUNNINGHAM and PRINSEP, *JJ.*

[CRIMINAL JURISDICTION.]

1881. *April 2nd.*

No. 756 of 1880.

CHUNDER SIRCAR AND OTHERS ..... APPELLANTS.

AND

EMPRESS ..... RESPONDENT.

Evidence Act, I of 1872, *Section* 50—*Statement made in absence accused—Confession.*

In a case of riot which resulted in the death of one person a serious injury to others from gun-shot wounds, the persons implicated were tried together before the Sessions Judge who adopted the following procedure: He examined the prisoners one by one, requiring the others to withdraw from the Court until their respective turn for examination came round, and, principally upon statements thus obtained in their absence, he convicted all the prisoners.

Held, that the Sessions Judge had, in adopting such procedure, acted in a manner directly opposed to the rule that no one should be condemned upon statements made in his absence, and therefore that all statements thus made by any of the prisioners in the absence of another, must be put out of consideration so far as they affected the latter.

APPEAL from convictions and sentences passed by the Sessions Judge of Pubna.

The facts are very fully stated in the judgment of the High Court.

M. P. Gasper and Baboo *Grish Chunder Chowdhry*, for the Appellants.

The judgment of the High Court (1) was as follows:—

This is a case of riot which resulted in the death of one Gopinath Manjee, permanent injury to the right arm of Korim Sirdar caused by gun-shots, and minor injuries to others also caused by gun-shots, and by cutting weapons.

The Sessions Judge in concurrence with both the Assessors convicted Chunder Sircar, Alum Poramanick, Nundo Manjee,

(1) MORRIS and PRINSEP, *JJ.*

akim Poramanick, of riot under section 148, Penal Code, but, ffering from the assessors, he has also convicted Chunder and undo Manjee of culpable homicide not amounting to murder, d he has sentenced Chunder Sircar to transportation for life, undo Manjee to transportation for ten years, and Alum Poraanick and Hakim Poramanick to rigorous imprisonment for three ars.

Concurring with one Assessor but differing from the other, the ssions Judge has further convicted Malu Sheikh, Modon Sheikh, Iudee Sheikh and Kalimuddeen Patan of riot, but he has, differing om both Assessors, also convicted the last named of culpable homide not amounting to murder, and he has sentenced Kolimuddeen atan to transportation for life, and the other three persons to three ars' rigorous imprisonment. Two other men were acquitted by e Sessions Judge.

Appeals have been preferred against all these sentences.

The appellants have been defended by Mr. Gasper both in the ssions Court and before us, and we are surprised to find that in a se of such public importance and of so serious a character, the gal Remembrancer has not been instructed to appear on behalf of e Prosecution.

It appears that disputes have been existing for some time past the village of Tepri between two parties claiming to receive rents m the ryots, the one party being certain Sandyals of Solop, Kali nder Sandyal and another, and the other party one Debi Dass, the tion purchaser of the rights and interests of Bykant Sandyal, brother the Sandyals of the first party. Before this occurrence Debi Dass d, but his interest is represented by his son Jibun Ram. The stence of these disputes and the likelihood of their terminating in erious riot was well known to the local Police, whose station 2½ kos or 5 miles distant from Tepri, and so late as the morning he riot which forms the subject of the present trial, the Head stable left the place on completion of an investigation into an nce which arose out of the disturbed state of the village. The lence shows that both sides had then assembled forcibly to assert r respective claims, and foreign clubmen (deshwalis) had been ted to overawe the villagers, and in the event of a disturbance

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to give to their respective sides the benefit of their superior stre and skill.

Under his purchase in 1283 or 1876 of the rights and inte of Bykant Sandyal, Debi Dass claimed the entire (16 annas s of the) rents of the village. The other Sandyals opposed alleging that the interest of Bykant Sandyal was only a small f tional share not exceeding one anna. The villagers generally yielded to the claim of Debi Dass, but a certain number of me the fisher class inhabiting the quarter called Manjeepara refuse pay him the rent demanded of them, and were supported and enc aged in their resistance by the Sandyals. The Zemindary Cute of Debi Dass was held at the house of Nundo Manjee close to Manjee's quarter, and a fence had been set up barring the pa into the homestead of Dusrut and Subul Manjee at the head of path which runs west and north of Nundo Manjee's home The object of this was apparently to protect the Manjees ag any sudden attack from the Cutchery quarter. These facts have been patent to the Head Constable, who was in Tepri or morning of the riot, and it is impossible to believe that they not also known to the superior Police officers at the adjo Police station. It is matter therefore of extreme surprise they did not take strict measures to prevent the breach o peace that was evidently imminent, or at any rate to hinde introduction of firearms and large bodies of "deshwalis" int village. This negligence on their part has deprived this Co independent testimony, and made it extremely difficult to asc from the garbled accounts of the partisans of either side wh real facts connected with the origin of this riot are, or to say party took the initiative. We gather, however, from the ev that on the 10th July 1880 (Asar 27th 1287) Chunder Sircar held open cutchery under a *gáb*-tree close to the h Nundo Manjee which had been set apart for a cutchery and collecting rent from the villagers on the part of Debi Dass.

An attempt was evidently made to collect the rent fr residents of the Manjeepara close by, and this was at once an attack in force by the Manjees aided by deshwali Sandyals who were either stationed in the house of Gopal in the neighbouring house of Bhagiruth Thakur. The

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e Manjee, Dusruth and Subul, which were in one cluster, be- : the scene of the disturbance and almost immediately a large of men on both sides assembled there and began the fight. or more guns were discharged at the Manjees resulting in the ding of Gopeenath Manjee, Kaim Sheikh and Dhonai. Gopee- died in hospital on the 13th from peritonitis caused by this y, and Kaim has been permanently deprived of the use of his ; arm. It would seem that they were standing in the lane the bamboo fence. There is much discrepancy in the evidence ding the number of shots fired and by whom they were fired, t is clear from the nature of the injuries inflicted and the shot- s found on the spot, that there must have been more than one arge of firearms. There was some attempt made on behalf he prisoners to account for these gun-shots by an accidental arge in a struggle brought on by the Manjees, but there is ason for accepting this explanation.

There can be no doubt that the guns were fired deliberately e Manjees to injure some of them, and to ensure success to Dass's party. Some of the witnesses even declare that certain ns, one of whom was the prisoner Kalimooddeen, were ordered re to drive off the Manjees; whichever party therefore made rst move, it is clear that the other was fully prepared to resist, it is equally clear that the party of Debi Dass overcame the jees and looted their houses after they ran away. There is no nce to show that the prisoners acted in the exercise of their rights of self-defence, and therefore any one of them who is d to have been present engaged in this riot is liable to be icted of some offence connected therewith. The Sessions Judge elt the difficulty of relying implicitly on the evidence of the jee witnesses who no doubt were actively engaged on their and he has adopted the extraordinary expedient of convicting risoners principally on what each has said regarding the other. ever much the law (Section 30, Evidence Act) may allow him ke into consideration a confession made by one of the prisoners ecting himself and also another prisoner, the course which Gasper states the Sessions Judge adopted in recording the nents of the prisoners, and which is not denied by the Sessions in reply to our enquiry on this subject, would prevent us

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from giving full effect to that law. It would seem that when Sessions Judge was about to examine the prisoners, he required to withdraw from the Court until his turn for examination round. In consequence of this procedure the principal pri Chunder Sircar was examined in the absence of the other pris who never had an opportunity of denying or even knowing wha had said, and yet that statement made behind their backs is a the chief ground for convicting them. It is an elementary that no one should be condemned in his absence, and yet the Ses Judge has acted in a manner directly opposed to it. We, there are obliged to place entirely out of consideration any state made by any of the accused in the absence of another prison far as it affects the latter.

It is quite clear from the statements made by Chunder Si Nundo Manjee and Hukum Sheikh that they were present this riot took place. Hukum Sheikh moreover bears on his p marks of wounds received in it. It is, however, necessary to d mine how far these prisoners were active members of the unla assembly causing this riot, and as regards the two first, whether have rightly been convicted of culpable homicide not amountin murder. It has already been stated that the party of Debi wers guilty of a riot, and all the prisoners now under trial belo to that faction in the village of Tepri.

[The Court then dealt with the evidence and in the end missed all the appeals.]

[CIVIL APPELLATE JURISDICTION.]

)BIND MOHUN CHUCKERBUTTY (DEFENDANT) ..... APPELLANT;

AND

. SHERIFF (PLAINTIFF) ..... RESPONDENT.

1881. *March* 10*th*.

No. 2628 of 1879.

count, Suit for amount due upon—Suit to compel the rendering of accounts.

The plaintiff having sued the defendant as his agent for an account and obtained a decree which merely directed that the defendant should render an account, a Commissioner was appointed to examine the accounts, and he found Rs. 82-3-11 only to be due, but it did not appear how the Commissioner was appointed, or whether his finding had been confirmed by the Court.

In a fresh suit filed by the plaintiff in which he claimed Rs. 500 as due in respect of sums not properly accounted for, it was objected that the plaintiff was bound by the finding of the Commissioner.

Held, that after the accounts had been filed by the defendant and adjusted by the Commissioner, it was competent to the plaintiff either to accept the money found due to him, or to sue the defendant in a fresh suit for the amount which he claimed from him.

Per GARTH, *C. J.* :—It is more convenient and a saving of time and expense when accounts are sought from a defendant to have the whole matter settled in one suit, instead of having, first, a suit to compel the rendering of an account, and then on the account being rendered, another suit for payment of the money which the plaintiff considers to be due to him; but the reason why two suits are generally brought in the mofussil is that the Courts there have no officer like the Registrar on the Original Side of the High Court to whom accounts can be referred.

PPEAL from a decree passed by the Subordinate Judge of Furidre, dated the 16th June 1879, affirming the decree of the Moonsiff that District.

Baboo *Sree Nath Das* and Baboo *Shoshi Bhoosun Dutt*, for the ppellant.

Baboo *Bussunto Coomar Bose*, for the Respondent.

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GOBIND MOHUN CHUCKERBUTTY v. W. SHERIFF.

Judgment.

GARTH, *C. J.*

The facts are sufficiently set forth in the judgment of the High Court (1) which was delivered by—

GARTH, *C. J.* :—We think that this appeal must be dismissed.

The plaintiff was the manager of an Indigo concern; and employed the defendant in the year 1873 to recover certain debts due to the concern for rents and otherwise, which debts the proprietors had made over to the plaintiff as a reward for his services.

The defendant continued in the plaintiff's employ for about a year, but as the plaintiff could obtain no account from him of the sums which he had received, he brought a suit in the Civil Court for an account. He then obtained a decree, but as the defendant would not even then render an account, he was obliged to enforce it by process of the Court.

Certain accounts were then rendered by the defendant which the plaintiff says he found to be false and imperfect; and as the defendant had omitted to credit several sums which he had received and had been the means of depriving the plaintiff of other debts through his neglect in not duly enforcing payment of them, the plaintiff brought this suit to recover Rs. 500 from him.

Both the Lower Courts have found, that the defendant received several sums for the plaintiff for which he has not properly accounted; and that there was due from the defendant to the plaintiff some Rs. 837-10-7-3; but as the plaintiff made his claim in the plaint for 500 Rs. he was held entitled to a decree for that sum only and interest.

The only ground of defence which has been relied upon is, that in the former suit which was brought in 1275, although the object of the Court was merely for rendering an account, a Commissioner was appointed to adjust the accounts between the parties, and to ascertain what sum was due from the defendant; that the Commissioner found Rs., 82-3-11 only to be due, and that the plaintiff in this suit is bound by that finding.

Now although it certainly does appear, that in the former suit a Commissioner was appointed for some purpose or other, we do not find that he had any authority to go into the accounts and ascertain what was due. The decree merely orders the defendant to render proper accounts to the plaintiff; and it has

(1) GARTH, *C. J.* and MCDONELL, *J.*

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Judgment.

GARTH, *C. J.*

ved how or why the Commissioner was appointed, nor that the ort of the Commissioner was in any way confirmed by the Court.

It was therefore competent for the plaintiff, after the accounts l been filed by the defendant, and adjusted by the Commissioner, her to accept the money found by the Commissioner to be due him, or to sue the defendant in a fresh suit for the sums which now claims.

We have been referred to a case decided by KEMP and NSLIE, *JJ.* reported in 22 W. R., 388, in which those learned dges considered, that in that suit the Lower Courts did not do eir duty by merely ordering that accounts should be rendered; at the proper order was, that the accounts should be examined d adjusted; and that it should be ascertained what was due from e defendant to the plaintiff; and as this had not been done the se was remanded.

It may be that the nature of the suit perfectly justified the rned Judges in making the remand; but in the generality of its in the mofussil, the plaint merely prays for an account. I member a case in this Court, (though I cannot say whether it as reported), in which MARKBY, *J.* explained very clearly the usual fference in the procedure between suits for an account brought n the Original Side of this Court, and similar suits brought in the ofussil.

On the Original Side the prayer of the plaint is not only for n account, but to have the account adjusted and the balance dered to be paid to the party entitled to it. The cases referred the Registrar for this purpose, and after the account has been ken, and the balance ascertained by the Registrar the case comes gain before the Court, and a final decree is made. Both parties ve a full opportunity, if they please, of going into evidence before e Registrar, and afterwards objecting to the Registrar's findings; d the whole matter is thus adjusted finally in one suit.

In the mofussil, however, this is generally done by means of vo suits. The first is brought to compel the rendering of an count; and then when the account has been rendered, and the aintiff has had an opportunity of examining it and testing its rrectness, he may sue in a second suit for the amount which he nsiders to be his due.

Of course it is far more convenient, and a saving of time and

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expense, to have the whole matter settled in one suit instead of tw but the reason why two suits are generally brought in the mofu is, because the Courts there have no officer like the Registrar to whom the account can be referred.

In the adjustment in this particular case, the plaintiff was course unwilling to be bound by any account furnished by t defendant considering the dishonest manner in which the la had dealt with him. This claim in this suit embraces several su which were not entered in the account rendered by the defenda and we see no reason for saying that the plaintiff's claim is bar by anything that occurred in the former suit.

Another point raised here, (I can scarcely say that it has b argued), is, that the defendant is wrongly found to be indebted the plaintiff in a sum of Rs. 333-7-9 which was said to be du the plaintiff on certain decrees. It does not very clearly app how or why the sum is found due from the defendant; but rather gather, that the defendant must have received that s and did not pay it over. This is quite immaterial, however, the purpose of the suit; because the plaintiff is found to be enti to 837 Rs. altogether; and the decree is only for 500 Rs.; so t the sum due for rents received is amply sufficient to support decree quite irrespective of the Rs. 333-7-9 said to be due as amount of the decrees.

The appeal is dismissed with costs.

[PRIVY COUNCIL.]

AMESSUR PERSHAD (PLAINTIFF), ... APPELLANT; 1880. *Nov. 23rd.*

AND

UN BAHADUR SINGH (DEFENDANT), ... RESPONDENT.

Hindu Law—Onus—Alienation by Hindu Widow—Inheritance, Charge by Hindu widow upon—Enquiry as to Necessity—Necessity for alienation by widow.

In a suit upon a bond or mortgage security executed by a Hindu widow, where it is sought to charge the inheritance after the death of the widow, the plaintiff is bound at least to show the nature of the transaction, and that, in advancing the money, he gave credit, on reasonable grounds after proper enquiry, to an assertion that the money secured was wanted for one of the recognised necessities.

The principle laid down in *Hunooman Persaud Panday* v. *Mussummut Baboee Munraj Koonwaree*, 6 Moore's I. A., 393 has been applied not only to the case of a manager for an infant, but to alienations by a widow and to transactions by which a father in derogation of the rights of a son under the Mitakshara Law has made an alienation of ancestral family estate.

APPEAL from a decree passed by a Divisional Bench (JACKSON and OTTENHAM, *JJ.*) of the High Court at Calcutta on the 2nd uly 1878 varying the decree of the Subordinate Judge of Gya, ated the 6th Dec. 1876.

The facts are stated in the judgment of the Judicial Committee.

Doyne and *C. W. Arathoon*, for the Appellant.

No one appeared for the Respondent.

The judgment of their Lordships of the Judicial Committee (1) as as follows:—

(1) SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER.

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The only material point to be decided upon this appeal a in a somewhat peculiar manner. The suit was originally bro by the plaintiff, appellant, who is a mahajan carrying on bu in the city of Benares, and also at Gya, to enforce a bond mortgage against the late Rani Asmedh Konwar, the instru being dated the 1st of March 1872. It appearing, how that the next reversionary heir was in possession of the prop alleged to have been mortgaged under an ikrarnamah exec by the Rani putting him in possession, apparently, of the w of her husband's estate, he was joined as a party defendan the suit; and it was prayed that a decree might be made for amount sued for, with costs and interest, and that it migh awarded "by sale of the mortgaged and hypothecated proper "and, in case the same do not cover the amount, by sale of o "properties, and from the person of the debtor." The therefore, was framed for the purpose of obtaining, in ca need, an absolute decree for the sale of the property alleg have been mortgaged, including the reversionary interest of second defendant therein; and, accordingly, the second issue settled so as to raise the question how far the reversionary e was bound by the widow's disposition. It is in these wo "Whether or not was the amount claimed taken for a "necessity; and whether or not is the amount of debt repay "by the property left by the husband of the widow, Mussu "Asmedh Konwar, who contracted the debt."

The Subordinate Judge, who tried the case in the instance, found wholly in favor of the plaintiff, and gave a for the amount sued for, and a further direction that in case not paid the mortgaged properties should be sold out a The High Court, upon appeal, so far confirmed the decree Subordinate Judge that it left the widow bound to the e being a debtor on the bond for the amount stated on the the bond to be due but determined that the deed had properly explained to her; that she did not understand, or properly informed, that it was a deed mortgaging the and consequently, that all that could be given against h decree in the nature of an ordinary money decree.

The appeal to their Lordships is against the decree of the High Court so far only as it was adverse to the plaintiff. After the decree was pronounced and before the appeal was presented here the widow died, and the second defendant, the only respondent upon the Record, became the absolute owner of the property in question.

Their Lordships concur with the High Court in thinking that, upon the evidence, there was a total failure of proof as to the proper explanation of this deed to the lady. It is not necessary for them to say whether, that being so, they should have gone so far as to make the money decree which was made against her. That is not the subject of appeal, and they must assume that so far the decree was properly made. Nor do they think it necessary to express any opinion whether in point of fact the bond sued upon, upon the face of it, purports to pledge more than the widow's interest. They will assume that it was intended by those who prepared it to be a pledge of the mouzahs and property which she had inherited from her husband. The only question to be decided on this appeal is whether the transaction created a charge on the inheritance; whether it made the property in question when in the hands of the respondent liable to satisfy the bond debt for which a decree has been made against the widow.

In order to establish the affirmative of this proposition, it is necessary in the first place to show that the widow intended to do that which the law allows her to do in certain specified cases, *viz.*, to make a pledge of her husband's estate. But if the High Court was right in supposing that the document was not properly explained to her, there is a failure of proof that she did really intend to do that. The question whether the property was mortgaged at all depends upon the fact whether she intentionally executed a deed containing such a stipulation; and their Lordships have already intimated that, in their judgment, the High Court, dealing as it did with the evidence of Bishen Sahi and the other evidence in the cause, was right in coming to the conclusion that there was no such proper explanation of the bond as would bind her in respect of that stipulation.

Again, if this were otherwise, there would remain the question whether the plaintiff had satisfied the burden of proof which every

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plaintiff who seeks to charge the inheritance after the death o widow, by virtue of a security executed by her, has to sus Their Lordships in no degree depart from the principles laid d in the case of *Hunooman Persaud Panday* v. *Mussummut Ba Munraj Koonwaree*, 6 Moore, I. A., 393 which has been so o cited. They have applied those principles in recent cases, not onl the case of a manager for an infant, which was the case there, to transactions on all-fours with the present, namely, alienation a widow, and to transactions in which a father, in derogatio the rights of his son under the Mitakshara law, has mad alienation of ancestral family estate. The principle, broadly down, is, that although the lender is not bound to see to application of the money, and does not lose his rights if upo *bonâ fide* inquiry he has been deceived as to the existence of necessity which he had reasonable grounds for supposing to e he still is under an obligation to do certain things. The wor the judgment in that case are: "Their Lordships think that "lender is bound to inquire into the necessities for the loan, an "satisfy himself as well as he can, with reference to the pa "with whom he is dealing, that the manager is acting in "particular instance for the benefit of the estate; but they t "that if he does so inquire and acts honestly, the real existe "an alleged sufficient and reasonably credited necessity is n "condition precedent to the validity of his charge, and they d "think that under such circumstances he is bound to see t "application of the money." And the judgment ends th "Their Lordships do not think that a *bonâ fide* creditor should "when he has acted honestly and with due caution, but is b "deceived."

It appears to their Lordships that, such being the la creditor who comes into Court to enforce a right similar which is claimed in the present suit is bound at least to nature of the transaction, and that in advancing his mone credit on reasonable grounds to an assertion that the m wanted for one of the recognised necessities.

In this case there is hardly any evidence on the plaintiff to show what negotiations took place with him, representations induced him to advance the money;

e any proof that, having those representations before him, he e the necessary and proper inquiries. The chief witness that been called, Fakir Chand, says of himself, that, although he is lage wasil-baki-nuvis and writes certain zemindari books, he nothing to do with the books relating to the mahajani business. true that he speaks to having been present when persons orting to come from the Rani asked for a loan of money for nent of Government revenue and the like; but one would ct in such a case as this, that the Gomashta, who had the gement of the books, and who was responsible for lending y from the kooti, would be the person to come forward and upon the faith of what representations, and after what in-y, he advanced the money. There is no evidence at all of that

Then, again, the servants who are called from the defendant's lishment gave evidence which cuts both ways, because, al-gh Dost Mahomed, calling himself one of the dewans of the , professed to have gone to the plaintiff and to have taken ey from him, he shows *primâ facie* that there was no real ssity for the plaintiff to borrow money under the power which ould exercise only in the case of certain necessities. His evidence to show that the lady was in fact in very easy circumstances, that she had a net revenue of about 1,30,000 Rupees. He :—"The amount of collections used to remain in the custody the dewan. A certain amount, when required, used to be paid the Rani. I cannot say off-hand what amount of collection nes to my hands. The expenses of the Rani, whatever they y be, are restricted to charitable and pious purposes and dis-bution to people, &c. Besides this, she does not spend anything h a lavish hand." So again Mahadeo Lal, who was called on art of the defendant, puts her income at even a larger amount, says:—"The balance, exceeding a lac and thirty thousand, d to be a saving to the Rani as profit. This amount used to lodged in the custody of the dewan. The necessary expenses d to be supplied to the Rani. The money would not be lodged the cutcherry."

The evidence of those two persons seems to their Lordships to nsistent with this state of things; that the Rani's servants,

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the dewans, chiefly managed her affairs; and if they had imm diate occasion for a sum of money they may have gone to t plaintiff's kooti and got a temporary loan, but it fails to pro necessity so serious as would justify a pledge of her husba estate in excess of the ordinary powers of a Hindoo widow, reasonable grounds for the belief of such a necessity.

Then as to the latest transaction there is little or no evid at all given by the plaintiff as to the settlement of the for accounts or the circumstances under which he advanced the s sum which made up the amount sued for upon the last bond. All the witnesses state is that one Baboo Ram Coomar, who is sai be also a dewan of the Rani's, told the Moonshi to get this l signed, some speaking to the making of the bond; but as to part taken by the plaintiff in making the last bond, or as to inquiries made on that occasion, there is no evidence whatever.

It appears to their Lordships that the High Court was r on both grounds in treating the transaction as not binding t the estate; and they will, therefore, humbly advise Her Maj to affirm the decree of that Court and to dismiss this appeal.

[CIVIL APPELLATE JURISDICTION.]

AMJOY GHOSE AND ANOTHER, (DEFENDANTS) ... APPELLANTS ; 1881. *March* 11*th*.

AND

AM RUNJUN CHUCKERBUTTI (PLAINTIFF)... RESPONDENT. No. 2134 of 1879.

rtition of Portion only of joint property, Suit for—Civil Procedure Code, Act X of 1877, *section* 265—*Revenue-paying lands, Partition of.*

A suit will not lie for partition of portion only of a joint estate.

Accordingly when the plaintiff sued for partition of a portion of a joint estate and for khas possession of the share which might on the partition be allotted to him, alleging that he had been deprived of possession of that portion by his co-sharers in collusion with others, it was held the suit would not lie.

Although under section 265 of Act X of 1877, a decree may be made for partition of revenue-paying land, yet that decree must be carried into execution solely by the Collector.

PPEAL from a decree passed by the District Judge of Birbhoom, ted the 6th September 1879, reversing a decree of the Subornate Judge of that District.

Baboo *Sreenath Dass* and Baboo *Ganendro Nath Dass*, for the ppellants.

Baboo *Mohiny Mohun Roy* and Baboo *Soorendro Nath Mutty Lall*, for the Respondent.

The facts are sufficiently set out for the purposes of this report n the judgments of the High Court (1) which were as follows :—

CUNNINGHAM, *J.* :—In this suit the plaintiff's case was that ertain lands from which he sought to eject the defendants did not orm part of the ijarah lease under which a part of the zemindari had een let. CUNNINGHAM, *J.*

Both the Lower Courts have found that this allegation of the laintiff is not borne out by the facts; but that the lands from

(1) CUNNINGHAM and PRINSEP, *JJ.*

1881.

RAMJOY GHOSE v. RAM RUNJUN CHUCKER-BUTTI.

Judgment.

which he seeks to eject the defendants do form part of the ija and that the defendants are holding under the ijarahdar. being the case, we think that the proper judgment in the would have been simply that the plaintiff's suit must be dismi and that it was unnecessary and improper to have gone fur and made any declaration about the future rights of the parties.

The judgment of the Lower Appellate Court must there be so far modified as to remove from it that part which goes bey the dismissal of the plaintiff's claim.

With regard to the claim for partition I consider that related only to a portion of the partible property it was impro made; and that the relief prayed could not have been gra Any claim for partition of common property ought to refer to whole of the partible estate.

The result is, that the orders of the first Court dismissing plaintiff's suit will be restored with costs in this and the L Appellate Court.

PRINSEP, *J.*

PRINSEP, *J.* :—I am of opinion, that the order passed by District Judge is improper for reasons already stated, and also the suit as laid is bad, because the plaintiff sued for khas posse by partition of a certain portion only of a revenue-paying es His allegation was, that the particular land which forms the sub of this suit fell without an ijarah that he had granted; and the defendants, his co-sharers, in collusion with the ijaradars, deprived him of separate possession of this land, and he accordi asked for khas possession by partition.

The judgment quoted by the Subordinate Judge, which 22 W. R., 11 sufficiently shows the reason why such a suit not be brought. The District Judge is wrong in holding th partition of revenue-paying lands can be made by a Civil C independently of the Collector. The terms of section 265 o Civil Procedure Code are perfectly clear on that point. The Court can pass a decree for partition of a revenue-paying es but the decree must be carried into execution solely by the Colle

The suit as brought is therefore bad, and the order o District Judge being beyond, as well as inconsistent with, what plaintiff asked for, should not have been passed.

[CIVIL APPELLATE JURISDICTION.]

1881.
March 18*th*.

No. 275 of 1880.

MEGH LAL POOREE, MOHUNT, (JUDGMENT-DEBTOR) ..... APPELLANT;

AND

MOHAMMED DUTT JHA AND OTHERS, (DECREE-HOLDERS) ..... RESPONDENTS.

Civil Procedure Code, Act X of 1877, *sections* 274, 287, 290, 295 *and* 311—*Sale in execution of decrees—Satisfaction of decrees rateably—Proclamation to specify amount of incumbrance—Irregularity in execution sale—Execution.*

If, when property has been attached in execution of a decree, and prior to sale, an application is made for execution of another decree so that the second decree-holder may participate under section 295 of the Civil Procedure Code in the assets realized, portion of the property attached be sold in the first instance, then, as both decrees are entitled to participate rateably, if the amount realized is not sufficient to satisfy both decrees, although sufficient to pay off the former, a further sale may be held.

As to reports of the Nazir and peons of the Court—see *Obhoy Churn Seek* v. *Erskine*, 3 W. R., Misc. 11; *Sreenath Thakoor* v. *Watson*, 4 W. R. Misc., 4; *Shib Koondun Lall* v. *Noor Ali*, 10 W. R., 3.

Under section 290 it seems intended that the copy of the proclamation should not be "fixed up in the Court House" until the proclamation itself has been made under section 274 of the Civil Procedure Code.

When properties put up for sale in execution of a decree are subject to any incumbrance, the proclamation ought to specify the amount of the debt outstanding. An omission to specify such amount affords strong *primâ facie* ground, where a mortgagee in possession is himself the purchaser, for believing that an inadequate price has been obtained.

APPEAL from an order passed by the Deputy Commissioner of Hazareebagh, dated the 4th August 1880.

1881.

MEGH LAL POOREE, MOHUNT v. MOHAMMED DUTT JHA.

Judgment.

PRINSEP, *J.*

Bonnerjee, R. E. Twidale, Baboo *Troylucko Nath Mi* and Baboo *Jogesh Chunder Dey,* for the Appellant.

Baboo *Chunder Madhub Ghose,* Baboo *Kally Mohun Dut* Baboo *Taruck Nath Sen,* for the Respondents.

The facts sufficiently appear from the following judgm which were delivered by the High Court (1) :—

PRINSEP, *J.* :—In execution of two decrees held by Norchu Dutt and Mohamed Dutt the right, title and interest of the ju ment-debtor, appellant, in three mouzahs Kharu, Khar Khan Palmo were attached and advertised for sale. Meantime a t decree-holder Sheo Pershad applied to execute his decree in c that under section 295 of the Civil Procedure Code he m participate in the sale proceeds.

The two first mentioned properties were then sold, and rea a sum more than sufficient to liquidate the decrees of the judgm creditors who originally put the Court in motion. The remai property was next sold and all the decrees have been satisfied.

Various objections were then taken to the sale, which disallowed by the Deputy Commissioner of Hazareebagh, and judgment-debtor has now appealed against that order. It is of all contended by Mr. W. C. Bonnerjee for the judgment-de appellant that as the decrees under execution were satisfied by two properties first sold, no further sale should have been h What would be the effect of an application made by those w decrees were under execution to abstain from further proceed on another decree-holder who had merely applied to execut decree so as to obtain the benefit of section 295, that is to partici in the assets realised in execution of the other decrees, we are called upon to decide, because it does not appear that in the now before us the two decree-holders who are actually execu their decrees made any such application. That the amount rea by the sale of the first two properties was sufficient to satisfy decrees is immaterial, since by the interposition of another de holder under section 295 that sum would not be payable to them a It would be subject also, to the claim of this stranger who section 295 would be entitled to a rateable distribution of the a

(1) CUNNINGHAM and PRINSEP, *JJ.*

It could not then be said that by the amount realised from the first sale, the decrees under execution were satisfied. We think therefore that the Lower Court rightly proceeded to sell the third property Palmo.

It is further objected that no proclamation of sale was made on the spot as required by section 274: that the Deputy Commissioner should have given the judgment-debtor an opportunity of proving his: that he improperly received in evidence and acted on the reports of the Nazir and peon: that even if the proclamation was made on the spot, it admittedly was not made until the 10th May, five days before the day fixed for sale, and therefore not in sufficient time; that the property was not properly described in the sale proclamation; that the Deputy Commissioner was not competent to adjourn the sale for three days in consequence of his sickness; that the mortgagee in possession should not have been allowed to purchase; and that in consequence of all these irregularities substantial injury has been caused, an inadequate price much below the proper value of the properties, being obtained.

It is in the first place clear that the Deputy Commissioner was wrong both in accepting as evidence the reports of the Nazir and peon regarding the sale proclamation having been regularly made, and in refusing to give the judgment-debtor an opportunity to adduce evidence to the contrary. The case quoted by him in 4 W. R., 227 is not in point. On the other hand it has been repeatedly held that such reports are not legal evidence—*Obhoy Churn Seek* v. *Erskine*, 3 W. R., 11 (Misc.); *Sreenath Thakoor* v. *Watson*, 4 W. R., 4 (Misc.); *Shib Koondun Lall* v. *Noor Ali*, 10 W. R., 3.

But even if the sale proclamation was made, it admittedly was not made until 10th May, five days before the day fixed for sale. We are informed by the appellant's Counsel, and this is not disputed by the respondent's Pleader that the place in which it is said to have been made is 60 miles from the Court holding the sale. It is pressed on us by the learned Counsel for the appellant that although the law, section 290, declares that it is necessary only that there should be an interval of thirty days between the date of fixing up of the sale proclamation on the Court House and the day of sale, that "fixing day" cannot be done until proclamation has been duly made and

1881.

MEGH LAL POOREE, MOHUNT v. MOHAMMED DUTT JHA.

Judgment.

PRINSEP, J.

reported to the Court. The terms of the law, section 290, ca leave this in doubt, and it is difficult to understand the obj enacting a specific term, 30 days, from any proceeding i final proceeding, unless the other necessary proceeding is con merely formal and of no material effect on the sale. It s to me, however, that the making of a sale proclamation on t is a most material proceeding, for it must be presume ordinarily purchasers will be those living in the neighbo best informed of the real value of the property and most li purchase from the situation of the property with respect t own residence or properties held by them. Of course in som it may be that the value of the property to be sold wil beyond the power of neighbours to compete at the auctio that the bidders can only be capitalists residing near th House, but such would be exceptional cases, and in seeki object of the Legislature we must look to the vast maj cases which occur. It appears to me, too, that it could n been intended that a copy of the sale proclamation should be up in the Court House" until it was actually reported to th that the proclamation itself had been made under section further think that the order in which these proceedings sh taken is indicated by the order in which they are expre section 290. If this view be not accepted, the Court in ea would have to determine whether a sale proclamation ha made in a reasonable time before the date of sale, so as t fair opportunity to persons likely to purchase who live on the property to be sold, although a term is specified with re the fixing up of the copy of the sale proclamation in th House. Such a rule would not only be inconvenient, but w contrary to what I conceive to be the intention of the Le *viz.*, to fix some term which must expire between the last s to bring a property to sale and the sale itself. I, therefo no hesitation in holding that if the proclamation was ma spot only five days before the date fixed for sale, there ha material irregularity in publishing it." It, however, incumbent on the person seeking to set aside the sale, the debtor, to show that "he has sustained material injury of such irregularity."

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Judgment.

PRINSEP, *J.*

As regards the objection taken regarding the adjournment of e sale for three days, in consequence of the illness of the Deputy ommissioner, we consider that that officer exercised a wise iscretion given to him by law (section 291) in refusing to hold e sale of properties of such large value except under his personal perintendence, which in his absence from illness would be im- ossible.

The next objection is, that the properties were imperfectly scribed in the sale proclamation. The law requires that a pro- amation of sale shall specify as fairly and accurately as possible y incumbrance to which the property is liable, and also every her thing which the Court considers material for the purchaser to ow in order to judge of the nature and value of the property. I serve that only the right, title and interest of the mortgagor hat is, the equity of redemption) were sold, and that the sale pro- amation states that the property is subject to a mortgage. It pears that the mortgagee is in possession of these properties, and at he is the purchaser at the auction sale. Now it is clear that to able a bidder to form any definite idea of the value of these pro- rties, the amount of the outstanding debt should have been speci- d. Unless that was declared, the mortgagee would be the only rson who was in possession of this information, and if that in- rmation were withheld, he would be able to bid at an advantage ith regard to other bidders. Such an omission where the mort- gee in possession is himself the purchaser affords strong *primâ cie* grounds for believing that an inadequate price was obtained.

We, therefore, remand this case to the Deputy Commissioner, d direct that he do give the parties an opportunity to adduce ch evidence as they may desire on the points indicated, and decide e case accordingly.

CUNNINGHAM, *J.*

CUNNINGHAM, *J.*:—This is an appeal from an order refusing to t aside a judgment sale of immovable property on the ground material irregularities in publishing and conducting it whereby e appellant has sustained substantial injury.

One of the alleged irregularities was that no proclamation was ade on the spot in conformity with sections 289 and 274 of the Civil ocedure Code. No opportunity was given to the execution-debtor proving this, the Court satisfying itself with the reports of the

1881.

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Judgment.

CUNNINGHAM, J.

Nazir and peon as sufficient proof of the proclamation. This w irregular. In the next place it is admitted that the proclamati on the spot, if made at all, was not made till five days before the sa With regard to this, the intention of sections 289 and 290 m in my opinion, be taken to be that the proclamation should be m on the property in question before or at the same time that the co of it is fixed up in the Court House: and the reason of t omission in section 290 of reference to the proclamation on the sp as one of the events which must occur at a specified time bef the sale, is that the Act regards the proclamation on the spot a the fixing of it up in the Court as simultaneous proceedings.

In the present instance as the distance of the property fr the Court was 60 miles, the period allowed was clearly inadequ and there was a material irregularity, which, if it can be sho that there has resulted material injury, (of which gross ina quacy of price would be an indication), would entitle the judgme debtor to have the sale set aside.

Another of the alleged irregularities is, the inadequate descr tion of the properties in the proclamation of sale. Section 287 the Civil Procedure Code requires that any encumbrance to which property is liable should be stated as well as every other thing, wh the Court considers material for the purchaser to know in order judge of the nature and value of the property. In this case proclamation stated the fact of an encumbrance, but omitted specify the amount of the mortgage debt still outstanding. T would leave the encumbrancer in a more favorable position than a one else to judge of the value of the equity of redemption, and he was the purchaser, it is probable enough that this irregulari did occasion substantial injury to the judgment-debtor.

The order of the Lower Court must accordingly be set asi and the case remanded to the Deputy Commissioner to re-hear t application with reference to the observations made above.

Costs will abide the result.

[CIVIL APPELLATE JURISDICTION.]

URGA CHURN DHUR AND ANOTHER (PLAINTIFFS)..... APPELLANTS;

AND

ALI KUMAR SEN (DEFENDANT)..... RESPONDENT.

1881.
March 17th.

No. 2788 of 1879.

...cement—Passage for boats—Channel, Right of passage over—Obstruction—Right of way, Cause of action.

A suit to have a certain channel over which the plaintiff had a right of passage for boats, and which had been slightly narrowed by the defendant (on whose land it was,) restored to its original condition, it appeared that the narrowing had in no way interfered with the passage of even the largest boats. The suit was dismissed on the ground that the plaintiff had suffered no injury.

Held, that the suit was rightly dismissed.

Per GARTH, *C. J.*:—A right of passage for boats over another man's channel is analagous to a right of way claimed over another man's road. The only obligation on the servient owner is, that he shall not unreasonably contract the width of the road or render the exercise of the right of passage less easy than it was at the time of the grant.

A right of way or right of passage for boats cannot be claimed in every direction over another's land.

APPEAL from a decree of the Second Subordinate Judge of Dacca, ...ted 6th September 1879, affirming the decree of the Moonsiff of ...unshigunge, dated the 15th August 1878.

This was a suit to remove certain alleged obstructions to a ...assage for boats over the defendant's land over which the plaintiffs ...laimed a prescriptive right to pass.

It appeared that over portion of the land in question there was ...passage for boats, and that this passage had been to a slight extent ...arrowed in various places by the falling down of an embankment ...ised on either side by the defendant; but it appeared that the ...assage of even the largest boats had in no way been interfered with.

From the evidence of the plaintiffs' witnesses as to the right ...passage over the other portion of the defendant's land, it appeared

1881.

DURGA CHURN DHUR v. KALI KUMAR SEN.

Judgment.

that was entirely covered by water, and that the plaintiffs' boats had been accustomed to pass over it in all directions.

The Moonsiff held that so far as the passage had been rowed, the plaintiffs were entitled to have it restored to its ori condition. The Subordinate Judge, however, held that in as as there had been no injury suffered by the plaintiffs, they were entitled to that relief.

Both Courts were of opinion that as to the land over the boats used to pass in all directions there could be no righ way, over the whole or any portion. The following cases referred to, *Radhanath Sugracharji* v. *Baidonath Seal*, 3 B. L App. 115; *Joy Doorga Dossia* v. *Juggernath Roy*, 15 W. R., 1

The plaintiffs appealed to the High Court on the gr that irrespective of any injury being sustained by them in re of the passage over which it was found they had a right, were entitled to a decree.

Baboo *Troyluckho Nath Mitter*, for the Appellants.

Baboo *Bussunt Kumar Bose*, for the Respondent.

The judgment of the High Court (1) which was as fo was delivered by—

GARTH, *C. J.*

GARTH, *C. J.* :—The plaintiffs claim a prescriptive rig passage for boats over a certain water channel belonging t defendant; and they say that the defendant has wrongfully structed that passage.

The Courts below have divided the plaintiff's claim int portions, As to the first, which is marked in the map wi letters ক খ গ ঘ ঙ, the Lower Appellate Court has found perfectly true, that the plaintiffs have a right of passage fo boats over that part of defendant's channel, but then it found that what the defendant has done has not interfe the plaintiffs' right. The defendant has merely raised an ment and done certain other acts which have confined the the channel by a few feet; but this admittedly leaves am for the passage of the plaintiffs' boats, even those of the la

With regard to the other portion of the claim, t Courts find that the plaintiffs have not proved any right

(1) GARTH, *C. J.* and MCDONELL, *J.*

1881.

DURGA CHURN DHUR v. KALI KUMAR SEN.

Judgment.

GARTH, *C. J.*

heir evidence, if it proves anything, goes to show that the plain-iffs' boats used to traverse the defendant's water in all directions nd in no particular line; and the Lower Court therefore finds that he right of passage is not proved in the particular direction indi-ated by the plaintiffs.

The plaintiffs complain before us of both those findings.

As regards the first part of the claim they contend that if they ave been exercising a right of passage over a channel of a parti-lar breadth, and that breadth is interfered with by the defendant en by a single foot, they have a right to have the whole breadth stored, though the channel that remains is amply sufficient for their requirements. We think it clear that this is not the law. right of passage for boats over another man's channel, is analo-us to a right of way claimed over another man's road. And we lieve that the law upon the subject is thus correctly laid down in ddard on Easements, 2nd Ed., 256.

It may be mentioned here, that a right of way along a private d belonging to another person does not give the dominant owner ight, that the road shall in no respect be altered, or the width creased; for his right does not entitle him to the use of the whole the road, unless the whole width of the road is necessary for his rpose; but it is merely a right to pass with the convenience to hich he has been accustomed. The right, therefore, merely ex-nds to that portion of the centre of the road, which is necessary r the due exercise of the right of passage. The only obligation on the servient owner is, that he shall not unreasonably contract e width of the road, or render the exercise of the right of passage s easy than it was at the time of the grant. We consider there-re that the Lower Court has taken a correct view of this part of e case.

Then with regard to the second point, we think it clear that e Court below was right in holding that the plaintiffs could not im a right of way *in every direction* over the defendant's water. ey could claim such a right only *in a particular direction* and s they have not proved.

We think, therefore, that the judgment of the Lower Court right, and that the appeal must be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

1881 April 5th

ALIMUNNESSA KHATUN (DEFENDANT) ..... APPELLAN

AND

No. 35 of 1881.

HASSAN ALI (PLAINTIFF) ..... RESPONDE

Mahomedan Joint Family—Necessaries—Joint Family, Liability of Mahomedan—Marriage expenses.

A and B who were Mahomedans living joint in food and es separated in Kartic 1279, and at the time of the separation ent into an agreement that "if claims relating to the joint estate brought on the ground that they are debts due on account of time we were joint and living in commensality then I, A and will pay such claims according to what is just in equal shares. either of us do not pay and one of us shall pay the share of other, then the person who has paid shall recover from the ot the amount he has paid for the other."

After the separation a decree was obtained against A for price of certain clothes supplied to him for his marriage which place while A and B were joint, and A having paid the amoun this decree sued B for one half of the amount so paid.

Held, that the debt was not incurred in a matter necessary to existence of the family but for the individual benefit of A, and t as in a Mahomedan family the individual benefited, and not family, is liable for expenses incurred for the benefit of any p cular member. A alone was liable for the debt.

Held, also, that the agreement had reference only to such cla as the family were jointly liable for.

APPEAL from a decree of the Officiating Judge of Dacca, d the 22nd September 1879, reversing a decree of the Moonsiff that District, dated the 1st July 1878.

The plaintiff and the defendant, who were Mahomedans, been joint in food and estate up to Kartic 1279, when they sep ted and the joint property was partitioned. Subsequently to separation a suit was brought against the plaintiff by a merch

1881.

ALIMUNNESSA KHATUN v. HASSAN ALI.

Judgment.

to recover the price of certain clothes supplied to him for his marriage at a time when the plaintiff and the defendant were admittedly joint in food and estate.

The present suit was to obtain contribution from the defendant of her half share of the amount of the decree in that suit which the plaintiff had paid.

It appeared that at the time of the separation a solenamah was executed by the plaintiff and the defeudant, the 9th paragraph of which was as follows:—If people bring claims relating to the said estate (the joint estate) on the ground that they are debts due on account of the time when we were joint and living in commensality, then I, Syed Hassan Ali and I, Alimunnessa will pay these persons their dues, according to the current law and according to what is just, in equal and half shares. If either of us do not pay, and we shall pay the share of the other, then the person who has paid shall recover from the other the amount he shall have paid for the other, with all legal expenses." It was contended by the plaintiff that this solenamah covered the claim made by him.

The Moonsiff dismissed the suit on the ground that the debt was a personal debt of the plaintiff and not a joint debt.

The District Judge, on appeal, held that a debt incurred for the purchase of clothes for the marriage of one of the members of a joint family was properly chargeable against the joint estate, and he accordingly gave the plaintiff a decree for the relief asked for.

The defendant appealed to the High Court for the decision of the District Judge.

Baboo *Rash Behary Ghose* and Baboo *Bhoobun Mohun Dass*, for the Appellant.

Moonshee *Serajul Islam*, for the Respondent.

The judgment of the High Court (1) was as follows:—

We think that in this case the decision of the Moonsiff is to be preferred to that of the District Judge. This was a suit brought by the plaintiff for contribution by his sister towards payment of a certain sum which had been recovered against him by a tradesman on account of clothes &c. supplied for his marriage. The

(1) PONTIFEX and FIELD, *JJ.*

1881.

ALIMUNNESSA KHATUN v. HASSAN ALI.

Judgment.

learned Judge has held that because the brother and sister living at the time, as he calls it, joint in food and estate, the was liable to pay all debts incurred for the purchase of cloth the plaintiff's marriage expenses because "both clothes and riage expenses are necessaries of life." We are unable to c in this view of the matter. Whatever was necessary for the exis of the several members of the family might probably be a c upon the joint fund; but in a Mahomedan family fo individual expenses of any separate members of the family individual benefitted, and not the family, would be bound to p

The learned Judge has also grounded his judgment o 9th para. of a certain solenamah executed by the brother and and which is as follows: "If people bring claims relating t said estate on the ground that they are debts due on account o time when we were joint and living in commensality then, I Hassan Ali, and I Alimunnessa, will pay these persons their according to the current law and according to what is just in and half shares. If either of us do not pay, and one of us shal the share of the other, then the person who has paid recover from the other the amount he shall have paid for the with all legal expenses."

Now it is quite clear to us that that clause relates to in respect of which the separate members of the family had j benefitted and what therefore both parties would be liabl The 12th para. of the solenamah to which we have also referred, does not carry the matter any further.

We, therefore, allow this appeal and reverse the judgm the Lower Appellate Court with costs.

[PRIVY COUNCIL]

AM ANUND KOER AND ANOTHER (DEFENDANTS) APPELLANTS; 1880 *Nov. 19th.*

AND

OURT OF WARDS (ON BEHALF OF CHUNDER SHIKAR, A MINOR) (PLAINTIFF) ..... RESPONDENT.

Hindoo law—Adoption by widow, Suit to set aside—Suit by contingent Reversioner to set aside adoption by widow—Procedure.

A suit to set aside an adoption by a widow can, as a general rule, be maintained only by the presumptive reversionary heir, unless such person refuses without sufficient cause to institute proceedings, or has by his own act precluded himself from bringing the action, or is in collusion with the widow or has concurred in the adoption, and therefore, where such a suit is brought by a contingent reversionary heir, the Court must exercise a judicial discretion in determining whether the plaintiff in such a case is entitled to sue, and will in general require the nearer reversioner to be made a party to the suit.

PPEAL from a decree passed by the Commissioner of Seetapore Oudh.

Leith, Q. C. and *Doyne*, for Appellants.

Cowie, Q. C. and *J. D. Mayne*, for Respondent.

The facts are fully set out in the judgment of their Lordships the Judicial Committee (1) of the Privy Council, which was as llows:—

The suit out of which this appeal arises was instituted in the ourt of the Deputy Commissioner of Lucknow, in the Province Oudh by the respondent, the Superintendent of the Court of ards on behalf of Rajah Chunder Shikar, a minor, against Ram nund Kunwar and Radha Kishen, the appellants, to set aside an option set up by them, by which, as they alleged, the first fendant had adopted the second defendant as the son of her ceased husband, Shunkur Sahai. The suit was transferred to the

(1) SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH SIR ROBERT P. COLLIER.

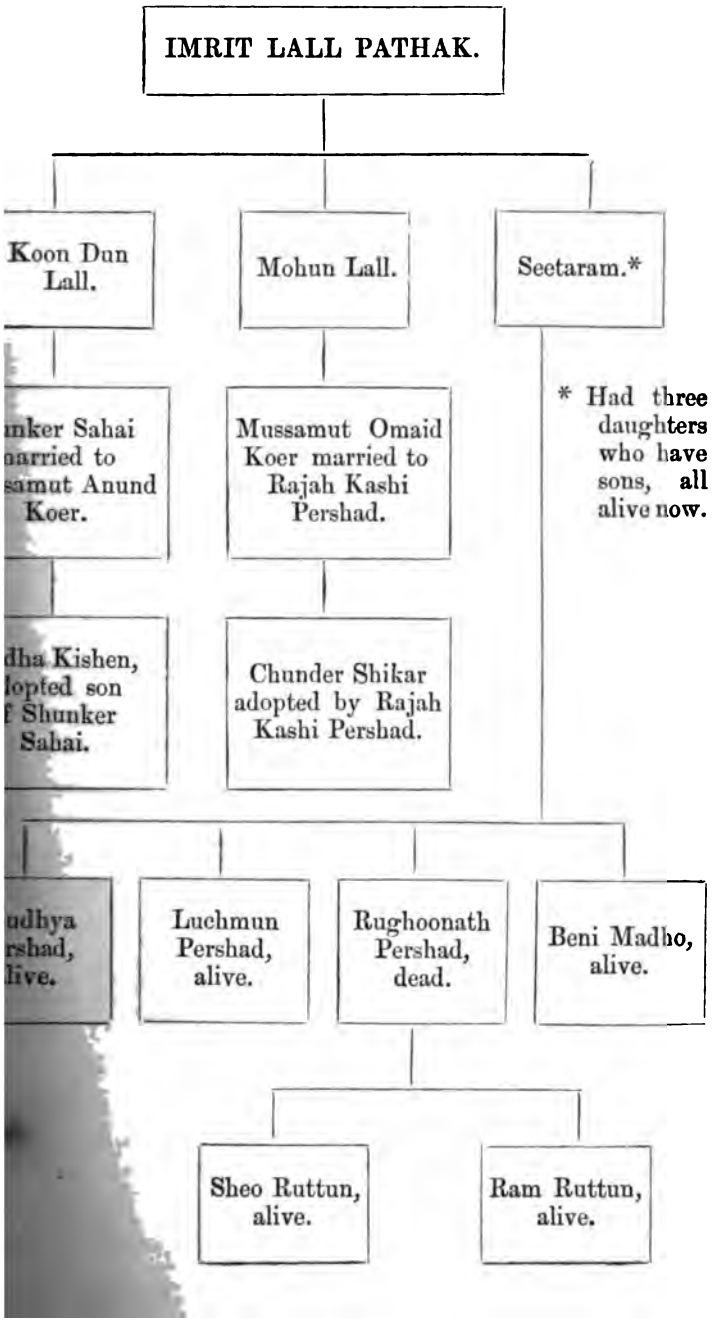
1880.

ANUND KOER v. COURT OF WARDS.

dgment.

Court of the Deputy Commissioner of Bari Banki in the distri
Sitapur. The minor on whose behalf the suit was instituted i
talukdar of Sersendi, the taluk having descended to him a
adopted son of Rajah Kashi Pershad, the former talukdar. I
order of Her Majesty in Council made in the year 1873, in p
ance of a Report of the Judicial Committee in an appeal in
the first defendant was appellant and the aforesaid Rajah I
Pershad was respondent, the first defendant was declared
entitled, as the widow and heiress of the aforesaid Shunkur S
to a Hindoo widow's estate of inheritance in four of the mo
and to a one-third share of the profits of seven others of the
zahs comprised within the said taluk of Sersendi, and to a
settlement of the said four mouzahs (see the case of the wid
Shunkur Sahai v. *Rajah Kashi Pershad*, L. R. 4 I. A., 208.
plaint in the present suit which was filed on the 8th July
stated that the suit was brought to set aside the so-called ado
of the second defendant, and also to set aside a decree given
section 15, Act VIII of 1859, declaratory of the so-called adop
obtained by the defendants by fraud and collusion. It alleged
the said Rajah Chunder Shikar was talukdar of Sersendi;
at the time of the said decree the defendant No. 1 was a
proprietor of the said taluka, and liable to him for the Govern
revenue demand plus a certain percentage; and that the effe
the so-called adoption and decree so long as they were not set
was to put the so-called adopted son of the first defendant in
place as sub-proprietor, and thus to thrust upon the talukdar
method contrary to law, an obnoxious sub-proprietor. The
further stated that the said Rajah Chunder Shikar was en
in reversion to the sub-proprietory estate so held by the defe
No. 1 and that the effect of the so-called adoption and of the d
declaratory of it, was illegally to injure and postpone that rever
that the said Rajah Chunder Shikar was further entitled i
diately in reversion to the sub-proprietary estate so held by
defendant No. 1 as aforesaid, by right of purchase under a de
sale bearing date 7th day of November 1862 and that the eff
the so-called adoption and of the decree declaratory of it was
gally to injure and postpone that reversion. The first defe
filed a written statement in which she set up the adopti
having been made in 1851, in pursuance of the verbal and w

rity of her deceased husband. She also set out a genealogical f the family, which both parties admitted to be correct so far goes, and of which the following is a copy :


IMRIT LALL PATHAK.
Koon Dun Lall.
Mohun Lall.
Seetaram.*
* Had three daughters who have sons, all alive now.
nker Sahai arried to samut Anund Koer.
Mussamut Omaid Koer married to Rajah Kashi Pershad.
dha Kishen, lopted son f Shunker Sahai.
Chunder Shikar adopted by Rajah Kashi Pershad.
udhya rshad, live.
Luchmun Pershad, alive.
Rughoonath Pershad, dead.
Beni Madho, alive.
Sheo Ruttun, alive.
Ram Ruttun, alive.

1880.

ANUND KOER v. COURT OF WARDS.

Judgment.

She further stated that the plaintiff had no *locus standi*, i had the Superintendent of the Court of Wards any right to inst the suit. Further, she alleged that the plaintiff had no right sue, because he was only her husband's uncle's daughter's son, during the lifetime of her husband's male cousins (the son Seetaram Pathak) and their sons (to wit Sheo Rutton and I Rutton), and the possibility of an adoption of a son being m by any of them, the plaintiff could not by any means be consid the nearest reversioner to her or to her husband. The De Commissioner held that the plaintiff was not the immediate r sioner, either by right of his being the talukdar or by inherita but that he was a remote reversionary heir, and was kept o his rights by virtue of the alleged adoption and declaratory d and that he had thereby sustained sufficient injury to entitl to maintain the suit. Accordingly he made a decree that alleged adoption and the decree declaratory of it be set aside as the plaintiff was concerned. Upon appeal the Commis affirmed the decree of the Deputy Commissioner, but on a diff ground. He agreed with the Deputy Commissioner that the tiff had not proved the alleged deed of purchase of the 7th De ber 1862. Upon which he relied; he held that the plaintiff not a reversionary heir of Shunker Sahai, but considered th talukdar he had a reversionary interest in the sub-proprietary which entitled him to maintain the suit. Their Lordships opinion that the first ground upon which reliance was plac behalf of the plaintiff, and upon which the Commissioner d in his favour, *viz.*, that as talukdar he had a right to hav alleged adoption and declaratory decree set aside as against is wholly untenable. Indeed the learned Counsel for the r dent was obliged to abandon it. The last of the three g upon which the plaintiff relied in his plaint, *viz.*, that h entitled by purchase to the immediate reversion in the m proprietary estate fails in fact, in as much as both the lowe concurred in finding that the alleged deed of sale of November 1862, was not proved. The only remaining then is—Is the minor a reversionary heir of Rajah Kash and if so, is he entitled to maintain the suit? It appears genealogical table above set out, and it is not disputed

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s the adopted son of Rajah Kashi Pershad who was the l of Omaid Koer, the daughter of Mohun Lall, who was a er of Koon Dutt Lall, the father of Shunker Sahai. It is sary to determine whether he could, under any circumstances by inheritance to the property of Shunker Sahai, and their ps abstain from expressing any opinion upon that point. ing, however, for the sake of argument, and only for the argument, that as an adopted son, he had the same rights urally born son, and that, as a naturally born son of Omaid would have been entitled, in default of nearer relations, ed by inheritance to the property of Shunker Sahai, it ly have been in the character of a distant Bandhu. It is at a son of a daughter of a father's brother is much further l in the order of succession than a son of a father's brother, of such a son. In any view of the case, the minor had sted, but at most a contingent interest in the property of r Sahai during the lifetime of his widow. See *Huridass Raugamoni Dossi*, 2 Taylor and Bell, 279. The question ises, is the contingent reversionary interest which the has, if he has any, sufficient to enable him to maintain on which is brought to impeach the adoption of the second nt? Their Lordships are of opinion that although a suit nature may be brought by a contingent reversionary heir, t, as a general rule, it must be brought by the presumptive nary heir, that is to say, by the person who would succeed idow were to die at that moment. They are also of opinion h a suit may be brought by a more distant reversioner if earer in succession are in collusion with the widow, or have d themselves from interfering. They consider that the d down in *Brikaji Apagi* v. *Jagannath Vithal*, 10 Bom. ., 351 is correct. It cannot be the law that any one ay have a possibility of succeeding on the death of the an maintain a suit of the present nature, for, if so, the o sue would belong to every one in the line of succession, remote. The right to sue must, in their Lordships' opinion ted. If the nearest reversionary heir refuses, without t cause, to institute proceedings, or if he has precluded by his own act or conduct, from suing, or has colluded

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with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue. See Koer *Golab Singh* v. *Rao Kurun Singh*, 10 Moore's, I. A., 193. In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit. In the present case, the Superintendent of the Court of Wards claims in the plaint a right to sue on behalf of the minor as a reversionary heir, without alleging that there are no others nearer in the line of succession, or that those who are nearer have precluded themselves from suing. In the course of the argument before their Lordships, it was contended that Adjudhia Pershad and Luchman Pershad two of the sons, and Sheo Ruttun and Ram Ruttun, the two grandsons of Seetaram, had precluded themselves from suing to set aside the adoption and declaratory decree mentioned in the plaint; but no such allegation was made in the plaint; nor does the point appear to have been taken in the Courts below. No issue was raised nor was there any finding of either of the Lower Courts in support of that view of the case. The point is not even expressly alluded to in the respondent's case or reasons. Their Lordships cannot, at this stage of the case, give any effect to the contention. Even if it were allowed to prevail, it would not apply to Beni Madhu, who was stated to be alive, but not to have been heard of for some time. It does not appear that he had been unheard of for a length of time sufficient to warrant a presumption of his death. Moreover, there was no allegation of his death, and no issue whether he was alive or dead, nor any evidence of an attempt to ascertain the fact. It must therefore be taken that there may be a son of a brother of Shunker Sahai's father in existence who is not precluded from suing. Consequently, the minor, who is merely the son of a daughter of a brother of the father, is not, under the rule applicable to such actions as the present, entitled to maintain the present suit. It must further be remarked that it appears from the genealogical table that Seetaram had three daughters who have sons living. They would be as near in succession to Shunker Sahai as the minor plaintiff would have been, even if he had been a naturally born son

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t must also be borne in mind that even if Adjudhia Pershad, uchman Pershad, Sheo Ruttun, and Ram Ruttun have precluded emselves from suing to set aside the adoption, the minor plaintiff uld not, even if he were a naturally born son, and the adoption the second defendant should be set aside, succeed to the property Shunker Sahai if either of the sons or grandsons of Seetaram ould survive the first defendant. The minor, admitting him to a Bandhu, has merely a very remote possibility of ever succeed- g to the property of Shunker Sahai. Their Lordships will, erefore, humbly advise Her Majesty to reverse the decisions of th the Lower Courts, and to dismiss the suit, with costs, in both e Lower Courts. The appellant's costs of this appeal must be id out of the estate of the minor Chundra Shikar.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF SAKHINA BIBI..... PETITIONER.

1881.

April 26*th*

No. 91 of 1881.

nal Code, Act XLV of 1860, *section* 211—*False charge—Procedure —Enquiry by Police—Police Report on charge made before Magistrate.*

A complaint having been made before a Magistrate, that officer, under section 146 of the Code of Criminal Procedure directed an enquiry to be made by the Police and on such enquiry being held it was reported to the Magistrate that the charge was false. Thereupon sanction to prosecute the complainant was granted under section 211 of the Penal Code.

Held, that in as much as the Magistrate on receipt of the Police report had not given the complainant an opportunity of substantiating the complaint, the Court had no power to sanction the prosecution. *Empress* v. *Karimdad*, I. L. R. 6 Cal., 496 (S. C.) 7 C. L. R., 467 and *Syud Nissar Hossen* v. *Ram Golam Singh*, 25 W. R. Cr., 10 followed.

1881.

re of KHINA BIBI.

dgment.

APPEAL from a conviction and sentence passed by the Sessions Judge of Sylhet.

Baboo *Joy Gobind Shome*, for the Petitioner.

The facts are set forth in the judgment of the High Court which was delivered by—

ORRIS, *J.* MORRIS, *J.* :—It appears to us that there is no legal foundation for the trial of Sakhina Bibi under section 211 of the Indian Penal Code. Sakhina Bibi lodged a complaint under sections 354 and 511 coupled with section 511 of the Penal Code in the Court of the Extra Assistant Commissioner. After her examination, the Court under section 146 of the Code of Criminal Procedure, directed a local enquiry to be made by a competent Police officer. This officer, a Sub-Inspector, submitted a report in which he expressed the opinion that the charge preferred was false, and that the complainant should be prosecuted for making a false complaint. Thereupon the Extra Assistant Commissioner passed the following order: "Let the papers be recorded as false, and let the papers be sent to the Deputy Commissioner for proper orders as regards instituting a case against the complainant under sections 211 and 182." Upon this the Deputy Commissioner on the 3rd December passed an order to the effect that in his view no notice ought to have been taken of the complaint owing to the character of the complainant, but as an enquiry had taken place he would allow the petitioner to be prosecuted if the District Superintendent of Police wished it. The District Superintendent of Police expressed a wish that a prosecution should follow. Upon this the Deputy Commissioner on the 20th December ordered the prosecution.

It seems clear to us that there has been no proper adjudication by the Extra Assistant Commissioner of the complaint preferred by Sakhina Bibi. On the receipt of the report of the Sub-Inspector he should have communicated its contents to the complainant, afforded her an opportunity, if she so desired it, of producing the witnesses named in her complaint or of giving such other evidence in support of her complaint as she might think proper. He has thus put the complainant to the proof, and given her the

(1) MORRIS and TOTTENHAM, *JJ.*

1881.

In re of SAKHINA BIBI.

Judgment.

mity of substantiating her complaint, the Extra Assistant Commissioner should have proceeded to decide the case. This course he as not adopted at all, and as Sakhina Bibi was prepared to give idence in support of her complaint, the Deputy Commissioner d, we think, no power to direct a prosecution under section 211 be instituted. This is in accordance with the Rulings of this urt in *Syud Nissar Hossen* v. *Ram Golam Singh*, 25 W. R, Cr. , 10 and in *Empress* v. *Karamdad*, I. L. R., 6 Cal., 496; C. L. R., 467. It also strikes us as improper that this prosecution ould have been decided by the Deputy Commissioner contrary to s own expressed opinion as to its propriety and solely in deference to e wishes of the District Superintendent of Police whose subordinate d been complained against.

We have to observe with reference to the Assistant Commissioner's explanation as to the examination of the complainant's tnesses, that their examination by the Sub-Inspector of Police hen enquiring into the original complaint, and their subsequent amination in the present case as witnesses for the defence before mself could not give the prisioner the opportunity of proving at the original complaint was true, to which she was entitled, fore she could legally be prosecuted for making a false charge.

We, therefore, quash the proceedings which have resulted in e conviction of Sakhina Bibi under section 211, and setting aside e sentence of 18 months' rigorous imprisonment, direct her release.

[CRIMINAL JURISDICTION.]

1881. Feb. 18th.

JABDAR KAZI AND GOLAP KHAN..... APPELLAN

Nos. 22 and 15 of 1881.

Criminal Procedure Code, Act X of 1872, *section* 454—*Cumul Sentences—Penal Code, Act XLV of* 1860, *sections* 147 *and* —*Separate charges.*

Under section 454 of the Code of Criminal Procedure the ex tive punishment which may be awarded for offences under sec 147 and 324 of the Indian Penal Code must not exceed that w may be given for the graver offence.

Quære: Whether separate convictions under sections 147 324 of the Indian Penal Code are legal.

IN the first of these appeals, both of which arose out of same case, the prisoner was convicted under section 148 as as under section 149 in connection with section 324 of Indian Penal Code, and was sentenced under the 1st charg 3 years' rigorous imprisonment, and under the 2nd charge further term of 2 years' rigorous imprisonment. Similar sente had been passed in the same case in a previous trial on s other prisoners whose appeals were, however, dismissed by ano Division Bench (JACKSON and TOTTENHAM, *JJ.*), the question raised not having been argued before those learned Judges.

L. Ghose and Baboo *Boido Nath Dutt*, for the Appellants.

The Junior Government Pleader, for the Crown.

L. Ghose:—The second sentence of 2 years' imprisonment un sections 149 and 324 of the Indian Penal Code is illegal. When offence falls under two separate definitions, the punishment m not exceed what might be awarded for either; and where seve acts constituting different offences collectively amount to so other offence, the sentence must not be in excess of what mig have been awarded for any one of the several offences or for offence formed by their combination—Criminal Procedure Code, S tion 454, paragraphs II and III. The 1st paragraph of that sect

merely lays down a rule of pleading and is silent as to the question f punishment. Illustration (f) to paragraph I, to which the essions Judge refers, merely makes it legal to pass separate sen- nces under each charge, or, in other words, to split the punish- ent which may be legally inflicted. But paragraphs II and III y down the maximum which the collective punishment must not ceed. Here the maximum sentence under either charge being years' imprisonment, the 2nd sentence of 2 years' imprisonment clearly illegal. Under the old Procedure Code it was held that parate convictions and sentences under different charges arising t of the same transaction were not legal,—*Reg.* v. *Dina Sheikh*, W. R., Cr. 63; *Nilrutton Sen*, 16 W. R., Cr. 45. But under e new Code (section 454, paragraph I, Ill. (f) separate convictions d sentences are not illegal provided the maximum punishment as id down in paragraphs II and III of the same section be not ceeded. *Vide Empress* v. *Budh Singh*, I. L. R. 2 All., 101 and *ujan*, 7 Mad. H. C. R., 375; *Reg.* v. *Gulan Bhas*, 12 Bom., 147.

[MACLEAN, *J.* :—There is also a Bombay Full Bench case, *Reg.* *Tukaya Bin Tamana*, I. L. R., 1 Bom., 214.]

All these cases are under the new Code and it is quite clear at when the collective punishment exceeds the maximum provided section 454 of the Criminal Penal Code, paragraphs II and III, is illegal.

The Junior Government Pleader for the Crown :—The separate ntences are legal under Illustration (f) which declares that an accused rson may be separately convicted and punished under each arge, and as there are no words in the Illustration itself limiting the nount of punishment, there is nothing to prevent the maximum ntence being passed under each charge.

The appellant's Counsel was not called upon to reply.

The judgment of the High Court (1) was as follows :—

These appeals arise out of the same trial. The appellants ave been convicted of being members of an unlawful assembly in hich one Guru Churn received fatal injuries, and one Babul Chand as less severely hurt.

It seems that they were acquitted of any offence as respects e death of Guru Churn; the conviction being for rioting armed ith deadly weapons, under section 148, and for hurt caused to Babul

(1) MITTER and MACLEAN, *JJ.*

1881.

JABDAR KAZI AND GOLAP KHAN.

Judgment.

Chand, under section 324, read with section 149 of the Penal Code. The periods awarded being 3 years under section 148, and 2 years under sections 149 and 324.

The learned Counsel, who appeared for Jabdar Kazi, appellant in Appeal No. 22, confined himself to urging that the sentences passed upon his client were in excess of what could be passed according to Law and that the injuries caused to Babul Chand by one of the members of the unlawful assembly,—not found to be his client,—were not caused in prosecution of the common object of the assembly.

The learned Counsel's contentions apply equally to the case of Gholab Khan for whom, however, he did not appear.

The first point turns upon section 454 of the Criminal Procedure Code, which provides for collective punishment either for one offence falling within two separate definitions of law, or for acts severally constituting more than one offence, but collectively coming within one definition. In the former case one punishment, and in the latter separate punishments, may be awarded, but in the former case it must not exceed what can be awarded for either offence, and in the latter they must not collectively amount to more than could have been awarded for any one of the several offences, or for the combined offence. Illustration (f) which is referred to by the Judge shows that offences under sections 147, 325, 152 may be separately dealt with.

In this case the conviction is for offences under sections 147 and 324, and this Court has held that separate convictions under those sections are not legal. *Vide* the case of *Reg.* v. *Durzoola*, 9 W. R., Cr., 33. There is, however, a contrary ruling in the case of *Reg.* v. *Calla Chand*, 7 W. R., Cr., 60, followed apparently by the case of *Empress* v. *Ram Adhin*, I. L. R., 2 All., 139, but whether there can be separate convictions or not, it is certain that under section 454 the Criminal Procedure Code the collective punishment must not exceed that which may be given for the graver offence, *Reg.* v. *Tukoya Bin Tumana*, I. L. R., 1 Bom., 214.

We shall, therefore, reduce the sentences on these appellants to 3 years in each case.

It is not necessary to discuss the second question raised in the appeal of Jabdar Kazi.

[CIVIL APPELLATE JURISDICTION.]

1881.
April 7th.

No. 244 of 1880.

OGHU NATH MONDUL, (PLAINTIFF) ..... APPELLANT;

AND

UGUTBUNDHU BOSE, (DEFENDANT) ..... RESPONDENT.

vil Procedure Code, Act X of 1877, *section* 13, *Expl. II.—Res Judicata—Decree for arrears of rent at particular rate, whether a bar to suit for abatement—Abatement—Act VIII (B. C.) of* 1869 *section* 19.

In a suit for arrears of rent the landlord proved a juma-bundi signed by the defendant admitting the area of the lands held and the rent payable to be as claimed by the plaintiff, and a decree was accordingly passed for the amount of arrears claimed, no further evidence being taken as to the extent of the land.

Subsequently the tenant filed a suit against the landlord alleging that he actually held a less area than that in respect of which he had been paying rent, and claiming the right to have the land re-measured and to pay rent in accordance with such re-measurement.

Held, that the question in the latter suit was not *res judicata* by the decision in the former suit.

Per FIELD, *J.* :—Section 19 of Act VIII (B. C.) of 1869, which provides that a ryot having a right of occupancy shall be entitled to claim an abatement of the rent previously paid by him if the quantity of land held by the ryot has been proved by measurement to be less than the quantity for which rent has been previously paid by him, is peculiarly applicable to a case in which rent is paid at so much per bigha or other local unit, and where rent is so computed and paid, the ryot is entitled to have a measurement at any time, and if the result of such measurement shows that he holds less than he has been paying for, he is entitled to an order for abatement which will have a prospective effect.

PPEAL from a decree of the Subordinate Judge of Dacca, ed the 24th September 1877, affirming the decree of the 1st onsiff of Munshigunge, dated the 15th August 1878.

1881.

ROGHU NATH MONDUL v. JUGUTTUNDHU BASE.

Judgment.

The plaintiff who held certain lands under the defend claimed in this suit to have the lands re-measured and to pay re in accordance with the result of such measurement. He alleg that whereas he had been paying rent in respect of an area 8 kanis, the land held by him did not exceed 4 kanis.

It appeared that the defendant had in a former suit for arre of rent recovered rent from the plaintiff in respect of the lar area. In that suit the present plaintiff raised objections both to the area and as to the juma payable. The present defendant that suit put in evidence a juma-bundi signed by the plaint himself admitting the rent and area to be as alleged in that suit.

The Court accordingly gave a decree for the amount claim and that decree was upheld in appeal.

The present suit was then instituted.

The Lower Courts held that the question of the area and t rent payable was now *res judicata* and dismissed the suit.

The plaintiffs thereupon preferred this Second Appeal.

The following judgments were delivered by the High Cou (1):—

Baboo *Bycunt Nath Dass*, for the Appellant.

Baboo *Chunder Madhub Ghose*, and Baboo *Bussunt Coom Bose*, for the Respondent.

PONTIFEX, *J.*

PONTIFEX, *J.* :—We think the decision of the Lower Appella Court in this case must be reversed. It appears that the defendant the present suit instituted a suit No. 43 of 1877 against the prese plaintiff claiming that rent to the amount of Rs. 27-2-3-2-2 was d to him in respect of former years on account of a certain quantity land. The present plaintiff, who was defendant in that suit, alle ed that the amount of rent and the extent of land had both be over-stated by the plaintiff. In deciding that suit the Subordin Judge held that the present plaintiff who was defendant in t case was bound by a juma-bundi which he had signed, and wh stated the amount of rent as claimed in that plaint, and being bound the Subordinate Judge refused to try whether the exten land had been over-stated or not by the then plaintiff. After decision of that case, the present suit was instituted in which

(1) PONTIFEX and FIELD, *JJ.*

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ROGHU NATH MONDUL v. JUGUTBUNDHU BOSE.

Judgment.

PONTIFEX, *J.*

plaintiff prays, notwithstanding the former decision, that this land should be measured and that his rent should be charged according to the strict measurement of the land.

Both the Courts below have held that this suit is barred—the previous decision being *res judicata*. Now if a measurement had been ordered in the former suit, and if upon such measurement it had been found that the present plaintiff held the quantity of land which he was alleged to have held in the former suit, that would have been a *res judicata* unless the plaintiff proved subsequent relinquishment of part of the land. Speaking for myself I think it doubtful whether in the former suit, which was for arrears of rent, the present plaintiff as defendant was entitled to insist that a measurement of land should be had. He, it seems to me, was bound to pay for the past years the rent which he was accustomed to pay until he took proceedings to get the rent adjusted according to the actual quantity of land in his holding. But whether that is so or not, we think, according to the proper construction of section 13 of the new Procedure Code, that the former decree cannot be treated as *res judicata*. Admitting for the sake of argument that the measurement of the land had been a matter directly and substantially in issue in that suit under Explanation II, yet it cannot be said that such matter was heard and finally decided by the Judge in the former suit; and not having been heard and finally decided in the decree in the former suit would not affect this suit as *res judicata* under section 13. I think, therefore, that the case should go back to the Court of first instance to proceed with the case.

The costs in this appeal will be costs in the cause.

FIELD, *J.*

FIELD, *J.*:—I am of the same opinion. The question of the quantity of land in the ryot's possession was determined in the former suit upon a juma-bundi signed by the ryot. The entry in this juma-bundi so signed by him had merely the effect of an admission of the quantity of land in his possession at that particular time. It seems clear to my mind that that admission as to the quantity of land then in his possession cannot estop him from showing in the present case the quantity of land which he now occupies. The former suit was brought to recover rent which had fallen due before its institution. The present suit (although the plaint contains much that might well have been omitted) is sub-

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Judgment.

FIELD, J.

stantially a suit for abatement. It is a suit which has no concer with rent which has already fallen due; it seeks to have it deter mined for the purposes of the future, what rent the ryot is bou to pay to his landlord. Section 19 of the Rent Law provid that a ryot having a right of occupancy shall be entitled to cla an abatement of the rent previously paid by him if the quanti of land held by the ryot has been proved by measurement to less than the quantity for which rent has been previously paid him. The provisions of this section are peculiarly applicable a case in which rent is paid at so much per bigha, kani or oth unit of measurement where rent is computed and paid in th manner, the ryot is entitled to have a measurement at any time and if the result of such measurement shows that he holds l land than he has been paying rent for, he is entitled to an ord for abatement which will have prospective effect. In the prese case the juma-bundi signed by the ryot and upon which t previous suit for rent was decreed contains the daghs compris the ryots juma and the rent of each particular dagh. The ry called upon his landlord to produce another juma-bundi whi contains further the area of each dagh and the rate of rent paya thereof. I think that these two juma-bundis may fairly be tak together; and, taking them together it is clear that the ryot pa his rent in this case at a certain rate per kani; and this being it is clear that the quantity of land in each dagh and the to quantity of land in the occupation of the ryot is an essential fac in determining the rent to be paid by him, in other words, that rent previously paid by him has been adjusted with reference the quantity of land held by him. He now seeks to show for purpose of future years and the rent to be paid by him hereaft that the quantity of land held by him can be proved by measu ment to be less than the quantity for which rent has been previo paid by him. Section 19 of the Rent Act clearly gives him right to have this question determined; and in seeking to h this question determined, he is not attempting to adjudicate a again the question determined in the former rent suit which concerned only with the quantity of land in his possession du the years; for the rent of which that suit was brought.

[CIVIL APPELLATE JURISDICTION.]

IN THE MATTER OF JUGGODISHARI DABI,..... PETITIONER. 1881. *April 2nd.*

Succession Act, X of 1865 sections 3 and 256—Probate—Executors—Administration Bond. No. 235 of 1881.

Under section 256 of the Succession Act not only administrators, but also executors are liable to give a bond to the District Court for the due collection of, getting in and administering the estate of the deceased.

See Probate and Administration Act, V of 1881, section 78.

APPEAL from an order passed by the District Judge of Rajshahye, dated the 20th January 1881.

In this case Juggodishari Dabi, the executrix under the will of the Doyamoyi Dabi, deceased, applied to the District Court of Rajshahye for probate of the will.

It appeared from the will that the applicant was not only executrix but sole legatee.

The District Judge directed probate to issue on security to the amount of Rs. 20,000 being furnished.

Juggodishari Dabi thereupon applied to the High Court and obtained a rule calling upon the Judge to show cause why the order should not be set aside, or why probate should not be granted without security being taken from her.

Baboo *Grija Sunkur Mozoomdar* (in support of the rule) :—

It was never intended by the Legislature that security should be taken from an executor, nor has it ever been the practice to take a bond from an executor. Under section 256 of the Succession Act a bond may be taken from an administrator but not from an executor. *Run Bahadur Singh* v. *Maharanee Rajrup Koer*, 4 C. L. R., 498; *In the matter of Monohur Mookerjee*, C. L. R., 228.

The reason is obvious: The executor is a person chosen by the testator himself because of the confidence, it is presumed, which he has in him, whereas an administrator is appointed by the Court.

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In re of JUGGODISHARI DABI.

Judgment.

MORRIS, *J.*

[MORRIS, *J.*:—Section 3 of the Succession Act says Probate means the copy of a will certified under the seal of the Court with *a grant of administration* to the estate of the testator. Then section 256 says that every person to whom *any grant* of administration has been made shall give a bond. It seems impossible, having regard to these sections, to hold that an executor is not liable to give a bond on administration of the property and credits of the deceased being granted to him under section 254.]

The Court (1) having taken time to consider the matter, the following judgment was on the 2nd April delivered by—

MORRIS, *J.*:—Regard being had to the definition of probate in section 3, of Act X of 1865, and to the words of section 256, which section appears to us to refer as much to section 254 as to section 255, we cannot say that the District Judge was wrong in law to require an administration bond from the person to whom the Court had ordered probate to be granted. In fact the Act scarcely seems to leave any option in the matter. A case has been brought to our notice, *Run Bahadur Singh* v. *Maharanee Rajrup Koer*, C. L R., 498, in which the learned Judges who were asked to direct that an order for probate should be conditional on the petitioner's furnishing security, stated that the uniform practice of the Court was not to take security from an executor named in the will. In that case, however, there was no judicial declaration that the taking of a bond would not be in accordance with the law. And we find no reported case in which this Court has interpreted the law in the sense contended for by the pleader for the petitioner, *viz.*, that the section 256 authorises the taking of a bond only in the case of the grant of letters of administration under section 2[illegible] and not in the case of grant of probate under section 254. We have found a case not reported, Miscellaneous Appeal No. [illegible] of 1876, in which a division Bench, following a supposed Rule of the Madras Court, High Court Rulings, 3 Mad. App. held that there was nothing in the law to authorise the District Judge in calling on the applicant for probate to give security. But on referring to the Report cited, we find that there was apparently nothing more than an extra judicial expression of opinion for which no reasons were assigned, elicited by a letter from

(1) MORRIS and TOTTENHAM, *JJ.*

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MORRIS, *J.*

istrict Judge. This is not sufficient authority for disregarding hat appears to be the clear provision of the Act.

We think, therefore, that in law the Lower Court was entitled call for the bond mentioned in section 256. But at the same e we are clearly of opinion that the Judge ought to exercise asonable discretion in prescribing the sum for which the bond uld be given; and that this question should be regulated by circumnces where, as is stated in the present case, the person to whom bate is granted is himself the universal legatee and sole executor der the will, it seems to us that the District Judge should be isfied with a bond for an amount almost nominal. With this ression of opinion which may probably induce the Lower Court re-consider its order, we discharge the rule.

Note.—In the recent Probate and Administration Act, V of 1881, section 256 of Succession Act is incorporated in Sec. 78 with an alteration expressly empowering District Court to take a bond from an executor to whom probate is granted. tion 78 provides that: "Every person to whom any grant of letters of administion is committed *and, if the Judge so direct, any person to whom probate is nted* shall give a bond to the Judge of the District Court &c." ED.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF IMANDI KHAN, ... PETITIONER.

1881.

March 30*th.*

No. C 204

Criminal Procedure Code, Act X of 1872, *section* 521—*Procedure —Obstruction—Thoroughfare.*

The fact of a Magistrate taking action under section 521 of the Code of Criminal Procedure is *primâ facie* sufficient to show that he considers the *locus in quo* to be a thoroughfare or public place; and if no objection is taken that it is not such, and the jury find that the order made under that section is reasonable and proper, the High Court will not interfere.

EFERENCE submitted by the Sessions Judge of Backergunge the opinion of the High Court as to the legality of an order made

1881.

In re of IMANDI KHAN.

Judgment.

by the Deputy Magistrate under Chapter XXXIX of the Code Criminal Procedure.

The order in question was made under section 521 of the Cod No objection was made that the place to which it referred was a a thoroughfare or public place. The petitioner merely asked th the matter should be referred to a jury.

The Sessions Judge was of opinion that the proceedings w bad and should be quashed for the following reasons stated by hi

"The reason for their being quashed is, that the Depu Magistrate has applied Chapter XXXIX of the Criminal Proced Code in a case where, admittedly, it has no application.

"It will be seen that one of the first questions laid down for jury to decide is, whether the way in question is a public thoroug fare.

"Until that point is decided by other proceedings Chap XXXIX cannot be enforced."

The opinion of the High Court (1) was as follows:—

Section 521 of the Code of Criminal Procedure applies only a thoroughfare or public place. The fact of the Magistrate taki action under section 521 is *primâ facie* sufficient to show that considered the *locus in quo* to be a thoroughfare or public pla No objection on this head was made by the petitioner who mer asked for a jury. In the case of *In the matter of Chundernath S* I. L. R., 5 Cal., 875 the fact of the place being a thoroughfare disputed, and it was properly held that if it was not a thoroughf the Magistrate had no jurisdiction, and that he ought therefor have tried this point first: but the present case differs from t case in this very respect.

The finding of the jury that the place was a thoroughfare t be taken to be mere surplusage, as no question on this point raised. The jury have found the Magistrate's order to be rea able and proper: and we must decline to interfere.

(1) PONTIFEX and FIELD, *JJ.*

[CIVIL APPELLATE JURISDICTION.]

ILCOMUL LAHIRI (DEFENDANT), ... APPELLANT;

AND

OTENDRO MOHUN LAHIRI (PLAINTIFF), .. RESPONDENT.

1881.
March 25th.

No. 282 of 1879.

Succession—"Adoption."

S, who had two brothers, the defendant and R, died in 1862 leaving two sons, who died before 1867, and a widow to whom he by will granted a power to adopt a son.

In 1867 C, the widow of R died childless, and, no son having yet been adopted by the widow of S, the defendant took possession of all the property left by C, as her sole heir.

It appeared that the defendant had by suppressing the will of S containing the permission to adopt and by putting forward a spurious will, fraudulently prevented the widow of S, in spite of repeated endeavours to do so, from adopting a son in the lifetime of C, and that it was not until 1874, after the High Court had declared her power under her husband's will to adopt a son, that she had succeeded in adopting a boy who, it appeared, was not born until after C's death. The boy so adopted then brought this suit in 1877 to recover from the defendant an eight annas' share of the estate left by C, claiming it as the adopted son of S.

Held, that the estate of C having once vested in possession in the defendant as the heir of C could not now be divested in favour of a person who by reason of a subsequent adoption had become an heir of C.

Held, also that the fraud committed by the defendant in preventing the adoption of a son by the widow of S was of too remote a character so far as it affected the plaintiff for the Court to disturb the estate which had vested in the defendant.

PPEAL from a decree passed by the Subordinate Judge of ngpore on the 30th April 1879.

This was a suit brought by the infant adopted son of one ibnath Lahiri through his adopted mother and guardian Bhoobu-wari Debi claiming a share in the estate which was left by one

1881.

NILCOMUL LAHIRI v. JOTENDRO MOHUN LAHIRI.

Statement.

Chandmoni, and which was held by her as the widow of I Mohun Lahiri the brother of Shibnath Lahiri. Chandmoni die the 2nd Assar 1274.

Bhoobuneswari had two children born of her womb, bot whom died in the lifetime of Chandmoni, the elder in Srabun 1 and the younger in Aughran 1272.

Bhoobuneswari alleged that she had before the death of Ch moni been endeavouring to adopt a son, but that the defendan fraudulently suppressing the will of her husband in which permission to adopt was given her, had prevented her until from taking any one in adoption; that in 1280 she had at last able to adopt the present plaintiff Jotendro Mohun Lahiri, however, was not born until after the death of Chandmoni.

The suit was filed on the 29th September 1877 less th years from the date of her death. Shibnath Lahiri died on th Joisto 1268.

The defendant Nil Kumul Lahiri was the son of Kali M another brother of Shibnath, and he claimed the property a inheritance from Ram Mohun on the death of his widow in 12

It appeared that the defendant had, as alleged, suppress will of Shibnath in which he had given Bhoobuneswari permi to adopt a son, and had put forward a will which did not co such a permission.

The will so put forward by him was contested and after l tion which lasted a number of years, it was finally decided b Privy Council, on the 25th March 1874, that the will put forw the defendant was spurious, and that the defendant had fraudu suppressed a will which did, as the plaintiff alleged, con permission to adopt.

It was found also that by so suppressing the will he had pr ed Bhoobuneswari, until 1280, from adopting a son. The Subo Judge held that by reason of the fraud on the part of the dant, the plaintiff was entitled in equity to recover the pr which he claimed as the adopted heir of Shibnath Lahiri and fore one of the heirs of Chandmoni, notwithstanding that th perty had already vested in the defendant as the heir of Shib the time of the death of Chandmoni, and he passed a decree ingly.

1881.

NILCOMUL LAHIRI v. JOTENDRO MOHUN LAHIRI.

Judgment.

MORRIS, *J.*

The defendant appealed to the High Court.

Jackson, M. Ghose, Baboo *Ishan Chunder Chuckerbutty* and Baboo *Mohiney Mohun Roy,* for the Appellant.

H. Bell, Baboo *Sreenath Doss* and Baboo *Bungshidhur Sen,* for the Respondent.

The judgment of the High Court (1) which was as follows was delivered by—

MORRIS, *J.* :—We understand the real plaintiff in this suit to be a minor, one Jotendro Mohun Lahiri, represented by his mother and guardian Bhoobuneswari Debi, otherwise the suit would not lie. The plaintiff lays claim to his share of the estate left by Chandmoni Debi, widow of Ram Mohun Lahiri the uterine brother of his adoptive father the late Shibnath Lahiri.

Chandmoni Debi died on the 2nd Assar 1274 which corresponds with the 15th June 1867. The plaintiff was adopted on the 10th Magh 1280, which corresponds with the 27th January 1874, by Bhoobuneswari Debi under permission granted to her under the will of her late husband—and though the defendant was the sole heir at the time of her death to the entire estate left by Chandmoni Debi, his succession to one half thereof is contested by the plaintiff in this suit on the ground that his adoptive mother was unable, in consequence of the fraudulent acts of the defendant to exercise, before the death of Chandmoni Debi, the power of adoption which was granted to her by her husband.

The Subordinate Judge of the Court below has given the plaintiff a decree. In his judgment he recites certain facts which he says are "sufficient in themselves to bring home to the conviction of the Court that the plaintiff exerted all her available means to adopt a child while Chandmoni was living, but that the intrigues played by the defendant stood in the way and prevented the adoption taking place till after the death of Chandmoni in Magh 1280, when she succeeded in adopting the minor Jotendro Mohun." He holds that the principles of equity should interfere in such a case to deprive the wrongdoer of the rights which he has acquired by the wrongful acts committed by him, and that the effect of the fraud perpetrated by the defendant entitles the plaintiff in

(1) MORRIS and TOTTENHAM, *JJ.*

1881.

NILCOMUL LAHIRI v. JOTENDRO MOHUN LAHIRI.

Judgment.

MORRIS, *J.*

equity to obtain the relief which he seeks. Against this decision the defendant appeals. He contends *first*, that no such act of fraud on his part has been established on evidence as goes to show that Bhoobuneswari Debi was prevented from adopting any boy, much less the present plaintiff prior to the death of Chandmoni Debi, and, *secondly*, that even if it be held that he committed a fraud on Bhoobuneswari Debi in suppressing the will of her husband, that fraud is too remote to enable the Court to divest in favor of the plaintiff an estate which has already vested for a long time past in him the natural heir.

Before entering into the question of fraud, it is necessary to notice an argument which has been much insisted on by the respondent's pleader to the effect that, fraud or no fraud, the plaintiff as adopted son of Shibnath Lahiri is entitled to his share of the family estate left by Chandmoni Debi—in other words, the plaintiff as heir of Shibnath Lahiri is entitled to succeed both lineally and collaterally to any estate to which Shibnath Lahiri, if alive, could lay claim. This argument has been noticed by the Lower Court and overruled by it on the authority of the case of *Kally Prosunno Ghose* v. *Gocool Chunder Mitter*, I. L. R., 2 Cal., 295, in which it was decided that a subsequent adoption after the succession has opened out, cannot confer on the adopted son the right to succeed collaterally and to divest the person in whom the property has already vested as heir to the deceased.

Several cases have been cited to us as authority to the contrary, but no single instance has been adduced in which in a case of collateral succession an estate once vested has been divested by reason of a person being brought into existence subsequently, who, if he had been in existence at the time when the succession opened out would have been a preferable heir. The general rule that the right to succession is a right which vests immediately on the death of the owner of the property, and cannot under any circumstances remain in abeyance in expectation of the birth of a preferable heir not conceived at the time of the owner's death, was declared by the late Sudder Dewani Adawlut in the case of *Kenal Chunder Ghose* v. *Bishno Purshad Bose*, S. D. A. Decisions for 1860, 340, and since that date this ruling has been universally followed. The Privy Council recognize it in the case of *Bhoobun*

Moyee Debia v. *Ram Kishore Acharj*, 10 Moore, I. A., 279, and declare the ordinary rule to be that in no case can the estate of the heir of a deceased person vested in possession be defeated and divested in favour of a subsequently adopted son unless the adoption is effected by the direct agency of the former heir or with his or her express consent.

The cases of *Gourbullah* v. *Juggernath Persaud Mitter*, Macnaghten's Considerations on Hindoo Law, 189 and *Sri Raghunadha* v. *Sri Brojo Kishoro*, L. R., 3 I. A., 154 cannot be said to be in opposition to this rule. In the one case a grandson and in the other case a son, took by adoption lineally the estate of the grandfather and of the father as against a nephew and a half brother. These cases are no authority for holding that if succession to an estate collaterally had opened out before the adoption, either the nephew or the half brother could have been divested in favour of the subsequently adopted grandson or son. The only ground therefore on which, it seems to us, the plaintiff can lay claim to the property suit is by asking the Court as a Court of Equity to place him as heir of Shibnath Lahiri in the position which but for the fraud of the defendant he would have obtained. That a fraud was committed by the defendant on Bhoobuneswari Debi in suppressing the will of Shibnath Lahiri and setting up a false will, and thereby putting obstacles in the way of her taking a son in adoption, cannot, we think be doubted. On this head we are disposed to agree with the finding of the Lower Court. The only question is, whether the present plaintiff standing as he does, in the position of heir to Shibnath Lahiri is entitled to say that the defendant is estopped by his fraud from relying on the adoption of the plaintiff being of a date subsequent to the death of Chandmoni Debi. Various cases such as *Luthrell* v. *Olmins* cited 11 Ves., 638 and 14 Ves., 290, *Middleton* v. *Middleton*, 1 J. and W., 96, *Segrave* v. *Kirwan*, Beatt. 157, *Bulkley* v. *Wilford*, 2 Cl. and F., 102, have been cited to us as authority in support of the proposition that Courts of Equity will, on proof of fraud, divest property once vested in favor of the rightful heir. But none of these cases seems to us to meet a case like the present where, as we judge from the evidence, the heir, that is, the present plaintiff, was not even in existence when the fraud was committed by the defendant. So far as the plaintiff

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himself is concerned, it may be said that but for the opposi made by him, the defendant, to the will of Shibnath, which widow set up, the present plaintiff would never have inherited estate at all. If the evidence is to be believed Bhoobunes Debi was prevented by this opposition of the defendant f adopting in the interval between the death of her last surviving and the death of Chandmoni some boy other than the plaintiff. is also apparent that the fraud of the defendant was not conc in any way from Bhoobuneswari Debi. She was from the first, is from the time of the death of her husband, aware of the exist of the will in her favor which empowered her to adopt a son, it may with some justice be said that between Srabun 1273, July 1866, the date of the death of Kali Prosunno Lahiri, her surviving son, and Assar 1274, or June 1867 the date of the d of Chandmoni, Bhoobuneswari had ample opportunity to ado son, and that the mere circumstance of persons, who were ap to, being unwilling to give their sons in adoption by reason of counterwill set up by the defendant, is not a sufficient ground holding that Bhoobuneswari Debi could not adopt a son. difficulties which stood in her way were no more than nat difficulties such as might be encountered by any one whose right adopt was disputed *bonâ fide*, and therefore the defendant as heir of Chandmoni at the time of her death became legally ve in her estate. It seems to us, therefore, that the fraud commi by the defendant, so far as it affects the plaintiff is of too re a character for this Court as a Court of Equity to disturb the e which naturally vested in the defendant as sole heir of Chandr at the time of her death.

We, therefore, set aside the decree of the Lower Court dismiss the suit of the plaintiff Jotendra Mohun Lahiri with in both Courts.

[CIVIL APPELLATE JURISDICTION.]

1881.
April 6th.

No. 317 of 1880.

AI DWARKANATH CHAKRAVUTI, (JUDGMENT-DEBTOR) ..... APPELLANT;

AND

AI SUVRIDRA NATH CHOWDHURI, (DECREE-HOLDER) ..... RESPONDENT.

Act VIII (B. C.) of 1869, *sections* 61 *and* 64—*Rent, Execution of decree for, by sale of under-tenure.*

It is only where the judgment-debtor is in receipt of the entire 16 annas share of the rent, that in execution of a decree for rent, the under-tenure can be sold.

APPEAL from an order passed by the Officiating Judge of the 4-Pergunnahs, dated the 24th July 1880 affirming an order passed by the 1st Moonsiff of Bushirhat on the 23rd March 1880.

This was an application by the holder of a decree for rent, that certain immovable property, other than the tenure in respect of which the rent decree had been passed, might be sold in execution.

The judgment-debtor objected that the under-tenure ought to be sold in the first instance. It appeared that he was in receipt of a eight annas' share of the rents, and that his interest had already been sold.

The Court, therefore, directed the immovable property specified to be sold, and this direction was confirmed on appeal by the District Judge.

An appeal was then preferred to the High Court.

Baboo *Shoshi Bhooshun Dutt*, for the Appellant.

Baboo *Bhowani Churn Dutt*, for the Respondent.

The judgment of the High Court (1) was as follows:—

The contention raised in this case by the appellant, the judgment-debtor under a decree for rent, is that the decree-holder is

(1) PONTIFEX and FIELD, *JJ.*

1881.

RAI DWARKANATH CHAKRAVUTI v. RAI SUVRIDRA NATH CHOWDHURI.

Judgment.

bound in the first place to sell the under-tenure upon which the arrear of rent, in respect of which the decree was passed fell due, and that, until he has sold such under-tenure he is not entitled to proceed to execute his decree against the other property of the judgment-debtor. That contention would be a good one if the decree-holder were in receipt of the 16 annas of the rent, but it appears from the decree filed in the case that the decree-holder is in receipt of an eight anna share of the rent only: and this being so under the provisions of section 64 of the Rent Act he could not under any circumstances sell the under-tenure itself, but could only sell the right, title and interest of the judgment-debtor therein.

Now, it is clear that the right, title and interest of the judgment-debtor had been already sold in execution of a money decree, and therefore the appellant cannot succeed in his contention that the decree-holder is bound to have resort to the under-tenure before proceeding against the other property of the judgment-debtor. Were it otherwise it is to be observed, that although the person in receipt of the sixteen annas share of the rent is, according to the construction placed upon section 61 of the Rent Act, bound to proceed in the first instance against the under-tenure upon which the rent has fallen due, it seems clear that this applies only in those cases in which the under-tenure is at the time of execution the property of the judgment-debtor. The law says "if after sale of any under-tenure in execution of such decree any portion of the rent decreed remains due, process may be applied for and issued against any other property, movable or immovable, belonging to the debtor." If the under-tenure does not belong or has ceased to belong to the debtor, it is impossible to say that the words "any other property movable or immovable belonging to the debtor" can have any application. The order of the Lower Court is therefore correct, and this appeal must be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

JURUBOOLAH SIRCAR, (JUDGMENT-DEBTOR)... APPELLANT;

AND

IOHUN LALL SHAHA AND OTHERS (DECREE-HOLDERS ..... RESPONDENT.

1881.
April 2nd.

No. 32 of 1880.

imitation under Act VIII (B. C.) of 1869, *section* 58—*Act VIII (B. C.) section* 30—*Judgment date of—Civil Procedure Code, Act X of* 1877, section 210.

In a suit under section 30 of Act VIII (B. C.) of 1869 a decree was on the 24th January 1876 made by consent for Rs. 100 payable by seven instalments, the first commencing in January 1876, and the last in August 1879—the whole amount to become due on default in payment of any two consecutive instalments. None of the instalments were paid. On the 5th April 1879 an application was made for execution of the decree.

Held by GARTH, *C. J.* and MORRIS, *J.*, PRINSEP, *J. dissentiente*, that the application was not barred.

Per GARTH, *C. J.*:—The reasonable construction of section 58 of Act VIII (B. C.) of 1869, and section 210 of Act X of 1877 taken together is this, that the words "from the date of such judgment" in section 58 of the former Act should be read as if they were "from the date when the rent is adjudged to be payable."

Per PRINSEP, *J.*:—The date of a judgment is the date on which it is delivered.

APPEAL from an order passed by the District Judge of Rungre, dated the 15th September 1879, reversing an order of the Moonsiff of Garbandha, dated the 5th July 1879.

The question in this case was whether an application made in April 1879, for execution of decree, dated 24th January 1876, in a case under section 30 of the Rent Law was barred by limitation.

The decree in question was a decree for Rs. 100 payable by seven instalments, the first instalment to be paid on the 12th February 1876, and the last on 12th February 1879. It was further provided by the decree, that upon failure to pay two successive

1881.

BOOLAH RCAR v. OHUN ALL AHA.

yment.

instalments, the whole amount of the decree should become payal None of the instalments were ever paid.

The application now made for execution was made on the of April 1879.

It appeared that a previous application had been made the 10th of January 1878, but that that application had been st off on the 7th of March 1878.

The Moonsiff dismissed the application now under consi ation on the ground that it was made more than three years from date of the judgment, and therefore barred under section 58 of Rent Act.

On appeal the District Judge reversed the order of the M siff, being of opinion that the application of the 5th April 1 might be taken as a continuation of that of the 10th January 1 and that limitation was thereby saved.

The judgment-debtor thereupon preferred this appeal w was heard by MORRIS and PRINSEP, *JJ.* but on their having di ed in opinion, was re-argued before the same learned Judges a with GARTH, *C. J.*

Baboo *Boyrub Chunder Banerjee*, for the Appellant.

Baboo *Ishur Chunder Chuckerbutty*, for the Respondent.

The following judgments were delivered by the Court (1):—

H, *C. J.* GARTH, *C. J.*:—The Judges of the Division Bench ha differed in opinion, this case has been referred to me as a Judge, and we have heard the point in difference again argued.

The suit was brought under section 30 of the Rent Law, a decree was made in the Court of first instance by consent of parties on the 24th January 1876 for the sum of Rs. 100, pa by instalments. The first instalment of Rupees 10 was pa in January 1876 and the remaining instalments of Rs. 15 were payable respectively in January and August of the 1877, 1878, and 1879, the last becoming due in August 18 upwards of 3 years from the date of the decree. On non-pay of any one of these instalments, the whole sum decreed b due.

(1) GARTH, *C. J.*, MORRIS and PRINSEP, *JJ.*

The two first instalments were not paid in due course, and he whole amount thus became payable.

An application for execution was made on the 10th of January 1879, which was struck off on the 7th of March following, in consequence of no one appearing in support of it. Another application was made on the 5th of April following, and an objection was then taken that by the terms of section 58 of the Rent Law (Act VIII (B. C.) of 1869) no execution could legally be issued upon the judgment in as much as more than 3 years had elapsed from the date of the decree.

The answer to this objection was two-fold, 1st: That the application on the 5th of April was only a continuation of the former application of the 10th of January.

2nd, That in a case like the present, the language of section 58 ought not to be construed literally, but that the 3 years' limitation ought to be reckoned, not from the date of the judgment itself, but from the day when the sum decreed was adjudged to be payable.

It was argued, and argued truly, that if the 3 years' limitation was to be reckoned from the date of the judgment, any decree, though obtained by consent, by which the amount payable would become due by instalments or otherwise at a date more than 3 years subsequent to the judgment would be absolutely useless, and consequently that it would be impossible for any Court to make a valid decree for a sum payable by instalments at a time more than 3 years from the making of it.

This would of course be materially limiting the power, which is given to the Courts by section 210 of the Civil Procedure Code, to make any sum decreed payable by instalments.

On the other hand it is argued that the very object of section 58 was in the first place to prevent the Courts from postponing the payment for more than three years; and in the next place to oblige decree-holders to enforce their decrees within that period, under pain of losing their money altogether. The intention was to prevent ryots being harassed and oppressed by rent-decrees being left hanging over their heads for a lengthened period.

I confess I have had great difficulty in coming to a conclusion on the point, and I am not at all sure, that I have at last arrived at the correct one.

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Judgment.

GARTH, C. J.

On the one hand, the language of the section appears to very plain, and there is no doubt much reason in the argument, the sooner these rent-claims are finally settled, the better it i the interests of agriculture.

On the other hand it seems hardly reasonable, that wh ryot is really unable, from poverty or otherwise, to pay the w rent within three years, a Civil Court should be positively disa (even at the instance of the ryot himself, and out of consider for his poverty), from making a decree payable by instalm extending over more than 3 years.

Most of the authorities which have been cited, appear t to render us little or no assistance; but it was decided in the of *Goloke Money Dabia* v. *Mohesh Chunder Mosa*, I. L. R Cal., 584 that the words "no process of execution shall be i on a judgment after the lapse of three years" in section 58, that execution shall not issue, *unless a proper application is for it within* 3 *years*. In this the Court seems to have ad the view taken by the majority of the Full Bench in the ca *Bidoy Krishna Ghose* v. *Kailas Chandra Bose*, 4 B. L. R. (F 82.

These cases certainly serve to show no more than this, tha Court will put a reasonable construction upon Acts of the L lature, and will not allow the strict language of a sectio prevent their giving it such a construction. Authority is sca needed for such an elementary principle.

The question with me has been, whether we ought to e that principle to the present case, and I have come to the concl that we ought. We must, I think, read section 58 of the Law with section 210 of the Civil Procedure Code, and it see me manifestly for the benefit of ryots that full powers shou given to the Courts to make rent-decrees payable by instalmen

If I am right in this, I think it almost follows as a mat course, that it would be a great injustice to a decree-holder, rent is thus made payable by instalments, to give him a s time for executing his decree than one whose rent is made p at once.

I therefore think that the reasonable construction of th sections taken together is this, that the words "from th

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such judgment" in section 58 should be read as if they were from the date when the rent is adjudged to be payable."

If I am wrong in putting this somewhat liberal construction on the words of the section, I hope I may be set right either by a Full Bench or by the Legislature.

The result of this decision will be, that the appeal will be dismissed with costs of both hearings in this Court.

Judgment.

MORRIS, *J.* :—I concur. It seems to me that in the absence of express provision, a local rent law cannot by implication only be understood to restrict the general right possessed by Civil Courts to give decrees for amounts payable by instalments over a period exceeding 3 years.

MORRIS, *J.*

PRINSEP, *J.* :—I regret to be unable to concur in the opinion expressed by my learned colleagues in this case. In my opinion the terms of section 58 of the Rent Law prevent the further execution of this decree.

PRINSEP, *J.*

Section 34 of the Rent Law declares the Code of Civil Procedure shall regulate all proceedings in suits of this description save as in that Act is otherwise provided. The Code of Civil Procedure (Act VIII of 1859) section 194 declares that in all decrees for the payment of money the Court may for any sufficient reason order that the amount shall be paid by instalments, but section 58 of the Rent Law provides that "no process of execution of any description whatever shall be issued or any judgment in any suit" (for arrears of rent) "after the lapse of three years from the date of such judgment unless the judgment be for a sum exceeding five hundred rupees." In my opinion the date of the judgment is the date on which it is delivered, for section 185 of Act VIII of 1859 provides that "the judgment shall be dated by the Judge in open Court at the time of pronouncing it," and section 189 adds "the decree shall bear date the day on which the judgment was passed."(1)

(1) NOTE.—In *Ex-parte Hookey*, 4 De G. F. and J., 456 it was held that the time which an order is made is that of the order being pronounced and of its date, and not that of its being drawn up. Lord Westbury there said, "The greatest possible confusion would arise were it otherwise. In fact all persons dating their rights from the time of the order being pronounced would be thrown into a state of the most inconvenient uncertainty if they could not exhibit to another Court or produce for the purpose of any legal enquiry the order containing the directions of the Court with the date in the certainty that the date will be accepted as the time

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Judgment.

PRINSEP, *J.*

Further I am of opinion that the intention of the Legislatu enacting section 58 was to insist on the early realization c decrees for small amounts of rent by withholding any action o Court towards obtaining payment by means of its processes acting under section 194, a Court fixes an instalment beyon term of three years from the date of its judgment so as to within the terms of section 58 of the Rent Law, in my opi that decree is in that respect a bad decree and incapable of b put into execution. With the terms of section 58 of the Law so clearly expressed, the Court could have no sufficient re for passing such an order. The consent of the parties would affect the operation of the law as has been held by PEACOCK, C in the case of *Krishna Kamal Singh* v. *Hira Sirdar*, 4 B. L F. B., 105.

I am therefore of opinion that we should read section 5 the Rent Law according to the plain sense of the words, it being duty to expound it as it stands.

I would therefore set aside the order of the Lower Court.

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when the order is made. * * * The principle which makes the order ever drawn up or entered to bear date on the day when it is pronounced b Court I hold it to be one in perfect conformity with the whole theory of ju procedure. The theory of judicial procedure is that the cogent and binding of the order begins immediately from the time when the order is pronounced b lips of the Judge." The case of *Ex-parte Hookey* was followed by BACON, C *Ex-parte Whilton*, L. R., 13 Ch. D., 881.—ED.

[CIVIL APPELLATE JURISDICTION.]

YAN CHUNDER SEN, (DECREE-HOLDER) ..... APPELLANT;
AND
URGA CHURN SEN, (JUDGMENT-DEBTOR) ..... RESPONDENT.

1881.
April 7th.

No. 302 of 1880.

ivil Procedure Code, Act X of 1877, *section* 396—*General Clauses Act, I of* 1868, *section* 2—*Partition—Decree, Execution of—"Commissioners."*

Per PONTIFEX, *J.* :—Although section 396 of the Civil Procedure ode directs the appointment of *Commissioners* to carry out an order r partition, it is quite competent to the Court to appoint one *Commissioner* for that purpose.

Quære per FIELD, *J.* :—Whether there is not in the context of ection 396 something repugnant to the plural "Commissioners" inclu- ing the singular "Commissioner."

Procedure under section 396 of the Civil Procedure Code discussed.

APPEAL from an order passed by the Officiating Judge of the 4-Pergunnahs, dated the 15th April 1880 reversing an order of ie Second Subordinate Judge of that District.

In this case a suit was instituted for partition of the joint roperty of the plaintiff and defendant.

An order was made declaring the shares to which each party as entitled and an Ameen was deputed to effect the partition. The meen duly allotted the shares and his report, notwithstanding rtain objections taken to it by the defendant, was confirmed.

On appeal before the District Judge, it was contended that the oceedings confirming the report of the Ameen were illegal.

It was objected that in as much as the decree made declared erely the shares to which the parties were entitled, that decree ld not be executed by the Court, and that therefore the proceed- gs of the Ameen and the order of the Court upon it were illegal.

The District Judge upheld the objection, his opinion being at the proper remedy of the decree-holder was to bring a fresh

1881. suit for possession of the share to which he had been declare

GYAN CHUNDRA SEN v. DURGA CHUN SEN. titled by the decree.

The decree-holder appealed.

Baboo *N. Mullick Bose*, for the Appellant.

Baboo *Bipro Nath Dass*, for the Respondent.

July 20. The following judgments were delivered by the High C

1 :—

PONTIFEX, J. PONTIFEX, *J.* :—We think this case must go back to the Di Judge who has disposed of it on a preliminary technical obje which we do not think applies. The plaintiff in this case for partition and obtained a decree from the Subordinate Ju Against that decree the defendant appealed to the District Ju not, however, raising the present objection, and his appeal dismissed. The decree of the Subordinate Judge was that plaintiff was entitled to a partition and to a certain share in property to be partitioned, and there was a direction that an Am should proceed to the land and partition the property. An Am accordingly proceeded to partition the property and he mad report to the Court. Against that report the defendant objections on the merits. The Subordinate Judge overruled objections, and confirmed the Ameen's report.

Against the order of confirmation the defendant again app ed to the District Judge, and after having acquiesced in all the ceedings that had taken place before the Ameen, for the first in the Court of the District Judge took an oral objection that tition proceedings could not be taken in execution of a decree. District Judge has held that that objection is tenable on the gr that section 396 of the Code of Civil Procedure shows that p fion proceedings are not to form part of what are ordinarily e execution proceedings. Section 396 directs that in any su which the partition of immovable property not paying reven Government appears to the Court to be necessary, the Court ascertaining the several parties interested in such property their several rights therein, may issue a commission to such sons as it thinks fit. Then it goes on to state what the proce of the Commissioners is to be, and it says that they are to pr

(1) PONTIFEX and FIELD, *JJ.*

sign a "report which shall be annexed to the Commission and nsmitted to the Court, and the Court after hearing any objec- ns which the parties may make to the report or reports, shall her quash the same and issue a new Commission or pass a cree in accordance therewith." We think it obvious that what intended by that section was that upon the first hearing of the the Court shall determine whether the plaintiff is entitled to rtition and shall ascertain who the several persons interested in property are, and shall direct by a preliminary decree or order Commissioners be appointed to make the partition. But there virtue in the word "Commission" in section 396. It is quite petent to the Court to appoint any person whom it thinks fit ommissioner to make the partition. True section 396 refers to mmissioners" in the plural; but speaking for myself I think General Clauses Act would apply, and under it words in the al number include the singular and *vice versâ*. There is no on that I can see why in his preliminary decree the Subordinate ge should not appoint the Ameen as Commissioner to effect the ition. And what has since been done is virtually what ought e done under section 396. The Commissioner prepared a report returned it to the Court; objections were taken to that report, e objections were disallowed by the Court and the Court has med the terms of the partition which had been arrived at by the missioner, and it then became the duty of the Court to pass a ee in accordance therewith. It is true that the Court has not ed a decree, but the order made in execution proceedings is ally a decree upon further consideration. The objection therefore at the most a mere technical objection taken after plete acquiescence in all the proceedings. But in my opinion even a technical objection lies, because the order of the Subordinate ge was an order within the meaning of the third clause of ion 396. At all events after complete acquiescence in all the ious proceedings it was too late for the defendant to raise such objection, and in our opinion it ought not to have been noticed. think, therefore, that the case must go back to the District ge to be tried on its merits, the preliminary objection being ruled. It does not appear clearly whether the objection in the rt below was raised and insisted upon by the defendant or

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Judgment.

FIELD, *J.*

whether it was an objection taken by the Court. If it was objection taken by the Court, we think the costs of this hear should be borne by the parties according to their respective sha in the property. If it was an objection pressed by the defend we think the Court below should deal with the costs of this app as to it may seem fit.

FIELD, *J.*:—I concur in the order of remand, and I think t the defendant having acquiesced in the proceedings ought no have been allowed to take the objection that the provisions of sec 396 of the Code of Civil Procedure require the appointment of n than a single Commissioner. Section 2 of the General Cla Act, I of 1868, enacts that, unless there be something repugnan the subject or context, words in the singular shall include the plu and *vice versâ*. Having regard to the language of the third cl of section 396 of the Code of Civil Procedure, I would have s doubt, whether there is not in the context something repugnan the plural "Commissioners" including the singular "Com sioner:" but it is not necessary to determine this question, agree that the defendant by acquiescing in the proceedings precluded himself from raising it at the stage at which he too objection.

[ORIGINAL CIVIL JURISDICTION.]

1881.

No. 159 of 1880.

RAJ COOMAR ROY,..... PLAINTIFF;

AND

ALFUZUDDIN AHMED,..... DEFENDANT.

Minority—Act XL of 1858, *section* 26—*Majority Act IX of* 1875, *section* 3—*Minor under Act XL of* 1858 *at time of Act IX of* 1875 *coming into force—Undue influence—Fiduciary Relationship.*

In a suit in Calcutta against one of the makers of a joint promissory note executed in Calcutta on the 9th June 1877 the defendant who was a Mahomedan pleaded infancy.

It appeared that the defendant was born on the 22nd July 1857; that, by an order of a competent Court, dated 6th November 1865 the father of the defendant was, under Act XL of 1858, appointed guardian of his property, portion of which was situated in the mofussil.

Held, that the effect of the order under Act XL of 1858 was to extend the minority of the defendant to the age of 18 years, and that consequently he was a minor on the 22nd June 1875, when the Indian Majority Act, IX of 1876, came in force, and therefore under section 3 of the latter Act his minority was further extended to the age of 21 years, so that on the date of the execution of the note the defendant was still a minor.

A third person who stands in no confidential relation to a grantor who is under age is not bound in the first instance to show that no undue influence was used.

The subject of undue influence considered.

THE plaintiff in this case sued to recover the sum of Rs. 14,000 certain promissory notes executed jointly by the plaintiff and father.

The defendant set up the plea of minority and also alleged that had not signed the notes in question as a free agent, but under direction and authority of his father under whose influence he

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was, and that he had received no part of the consideration for notes.

It appeared that at the time of signing the notes in que the defendant having been born on the 22nd July 1857 was the age of twenty years.

It further appeared that an order was made in the Patna on the 6th November 1865 by which his father was under the visions of Act XL of 1858 appointed guardian of the proper the District of Patna of the defendant and of his minor brother sisters, and that the defendant had not attained the age of 18 when the Indian Majority Act came in force.

Allen (*T. A. Apcar* with him) contended that under the M medan Law the consent of the guardian cured the defect of a the defendant at the time of his executing the notes.

He referred to *Cally Churn Mullick* v. *Bhuggobutty* (*Mullick*, 10 B. L. R., 231 and contended that the age of ma of the defendant was at the end of 15 years.

Kennedy (for the defendant:—In *Cally Churn Mullick* v. *gobutty Churn Mullick*, 10 B. L. R., 231 the defendant n resided nor had property in the mofussil.

Here the defendant was a minor of whose property a gu had been appointed under Act XL of 1858, and therefore section 3 of the Indian Majority Act, IX of 1875, he could deemed to have attained his majority before he had complet age of twenty-one years, for when that Act was passed the dant had not completed his 18th year, and therefore was minor. It was absurd in face of the Majority Act to say th Mahomedan Law as to the consent of the guardian cured the of age in this case.

[On the question of undue influence, the following case quoted:—

Kempson v. *Ashbee*, L. R., 10 Ch. App. 15, *Rhodes* v. *B* R., 10 Ch. App. 15, *Chambers* v. *Crabbe*, 34 Beav., 457, v. *Dawson*, 34 Beav., 608, *Sercombe* v. *Sandars*, 34 Beav. *Maitland* v. *Irving*, 15 Sim., 437, *Maitland* v. *Buckho* Sim., 58, *Espey* v. *Lake*, 10 Hare 260.]

T. A. Apcar was heard in reply.

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Judgment.

BROUGHTON, J.

The following judgment was delivered by—

BROUGHTON, *J.* :—This is a suit to recover the sum of Rs. 14,000 id to be due on a promissory note dated the 9th June 1877, with terest. The note is payable on demand, made by Nawab Amir li Khan Bahadoor and his son, the defendant, jointly and severally favor of the plaintiff for Rs. 20,000 with interest at the rate of per cent. per annum.

The plaintiff acknowledges the receipt of Rs. 6,000 with terest up to the 8th day of October 1879 and he sues for the lance. The plaint states that the Nawab died on the 16th ovember 1879. His representative is not joined as a party to the it which is against the defendant personally and alone. The fendant admits that he made some such note as the note sued on, d the evidence shews that he made the note in question, but he clares that he made it when he was under the age of 20 years, and as residing with his father and was entirely under his authority. e was obliged by his father to sign the note for which he himself ceived no consideration. He alleges that the plaintiff well knew that was dependent upon, and under the authority of his father that signed the note by his direction under such paternal authority d not being a free agent in the matter, and that the plaintiff also new that he received no portion of the consideration or made any yments on account of the note.

The defendant objects that his father's representatives ought be made parties, but this point has not been pressed, and he con- ds that he himself is not under the circumstances liable.

Some months after filing his written statement the defendant d a second written statement in which he sets up the plea of nority under some very special circumstances.

I think it right to give my opinion upon both the issues raised the case which are :—*first*, whether the note is void as inst the plaintiff, because it was made when the defendant was ler undue influence, and *secondly*, whether the defendant was a or when he made it.

The first contention and the one on which Mr. Kennedy laid st stress is, that under the circumstances of the case the defen- t is not liable because he was, when he made the note, under influence of his father and that the plaintiff knew this, and

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several cases in the English Chancery were cited in support of t view. There is no doubt that the Court of Chancery has infer and I think that this Court should follow the Court of Chan in inferring, in certain cases, from the relation existing betwee parties as in the case of a parent and child, guardian and ward that influence exists, and the parent or guardian &c. who takes benefit of the transaction, especially when the child is just of must show that the other had independent advice and acted of free will, *Rhodes* v. *Bate*, L. R. 1 Ch. Ap., 250, *Kempson* v. *Ash* 10 ib., 15, *Sercombe* v. *Sandars*, 34 Beav., 382, *Chambers* v. *Cra* ib., 457, *Berdoe* v. *Dawson*, ib., 608, *Maitland* v. *Irving*, 15 Sim *Maitland* v. *Backhouse*, 16 ib., 58, *Espey* v. *Lake*, 10 Hare, 260 c by Mr. Kennedy. See also *Hoghton* v. *Hoghton*, 15 Beav., 278, *penter* v. *Heriot*, 1 Eden, 338, *Morse* v. *Royal*, 12 Ves., 372, *Wr* v. *Proud*, 13 ib., 136, *Turner* v. *Collins*, L. R. 7 Ch. Ap., 329, *W* v. *Middleton*, which is a very strong case and is cited in *Orm* v. *Hutchison*, 13 Ves., 47. Unless this is shown such transacti are set aside on the broad ground that they are considered to be trary to the policy of the law.

In the present case the Nawab was not only the father of defendant, but was the appointed guardian of his property so tha between him and his son, the transaction comes within the princ of these cases. But I do not find any authority for holding th third party who stands in no confidential relation to the grantor bound in the first instance to show that no undue influence was u

The witnesses for the plaintiff state that they were present w the note sued on was made, the defendant denies this, but no says that any coercion was used on that occasion, the defend indeed admits that his father was a kind parent, and that he at no time any direct influence on him to induce him to sign note. He says that he was afraid that if he refused, his fat who sometimes lost his temper, would be angry with him.

There is not any authority that I have been able to fin show that this is sufficient to invalidate the note as against plaintiff. On the contrary in a case decided by the Master of Rolls in 1850, *Thornber* v. *Sheard*, 12 Beav., 589 in which case transaction was very similar to this, it was held that the mere of a daughter just of age, voluntarily joining her father in a

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favor of his creditor, was not ground for imputing undue in-
ence to the father, or, even if such influence had been exercised,
r imputing knowledge to the creditor.

It seems to me that the defendant cannot succeed on the
ound that he made the note under undue influence exercise over
m by his father to the plaintiff's knowledge.

Then comes the question of minority.

I think it is proved that the defendant was born on the 22nd July 1857.

Two books No. 2 and No. 3 are put in evidence, both in the ndwriting of the Nawab. No. 2 is a book of poems and No. 3 is family history. In each of these is an entry shewing that e defendant was born on the 29th of the month of Zilkaid in the ijree year 1273, corresponding with the 22nd of July 1857. hese entries are corroborated by the evidence of the uncle and by entry in his calendar, No. 4 which like No. 2 and No. 3 is missible as evidence under section 32 of the Evidence Act, cl. 6. is also proved that the Judge of Patna made an order on the 6th November 1865 under Act XL of 1858 constituting the Nawab ardian of the property of his minor children, and the order itself aled with the seal of the Court is put in evidence and marked o. 1. Mr. Apcar objected to this document, but it appeared to me at it was relevant to the issue, and there was not any proof that e order was made without jurisdiction; on the contrary it is shown at the defendant had property in the mofussil which made him bject to the jurisdiction, and I am bound to take judicial notice of e seal of the Court.

It is then argued that the effect of this order was to extend e term of minority in his case until he attained the age of 18, at is to say, until the 22nd of July 1875, and that consequently, as was a minor when the Indian Majority Act of 1876 came into eration on June 22nd 1875, section 3 further postponed the period til he attained the age of 21 years, that is to say, until the 22nd ly 1878, after the note now sued upon was made.

The first question is whether by the operation of Act XL of 58 the defendant was a minor on the 2nd of June 1875. Section of this Act enacts that :—

"For the purposes of this Act, every person shall be held to a minor who has not attained the age of eighteen years."

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Act XL of 1858 has been subject to much discussion. Bench of this Court in the case of *Madhusudan Manji*, 1 B. F. B., 49 decided that the plaintiff who had landed property mofussil was a minor by reason of Act XL, although proce under that Act had not been taken for the protection of his pr or for the appointment of a guardian. This decision went no f In *Kally Churn Mullick*, 10 B. L. R., 231 also decided by Bench, the question before the Court was "whether under A of 1858 eighteen is the age of majority of Hindus reside domiciled in the town of Calcutta and not possessed of pr in the mofussil?" and it was held that eighteen was not t of majority, but that the age of majority was at the end of 1 A variety of cases were referred to by the Chief Justice in this had been held by the late Supreme Court and by this since the passing of Act XL of 1858.

In the present case the defendant and his father were re of Calcutta, but the defendant had property in the mof respect of which a guardian had been appointed under Act X

That there might be two periods at which the same attains majority under the legislative enactment of this c was pointed out by COUCH, *C. J.* in 10 B. L. R., 240, where hi ship observes that "two standards have been set up by Reg XXVI of 1793, and it was the state of the law until Act 1858, was passed." Again, in the case of *Sultan Chand* v. 12 B. L. R., 358, it was held that the definitions of "mino "minority" contained in the Indian Succession Act do no when a person enters into a contract on his own behalf and any representative character under that Act so that he m of age for the purposes of that Act but in other respects a m

It may therefore be that the defendant who was a marr in 1874 and had a daughter born in the beginning of 187 was therefore, as I think, a major according to Mahomed was a minor for some purposes under Act XL of 1858 w Majority Act came into force on the 2nd of June 1875, a had made this promissory note in the mofussil or had be upon it in the mofussil, I think, as his property was under dian, he must have undoubtedly been held to be a mino 2nd of June 1875.

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I do not think that it is necessary to say more than this in order to determine whether the Majority Act of 1875 applies to him.

Although the law has been so far anomalous, it does not follow that Act IX of 1875, which was passed to render it uniform for the future, used the word "majority" in two senses. That Act is not to affect the capacity of any person who before the 2nd of June 1875 has attained his "majority" under the law applicable to him" section 2 cl. (c.)

Now supposing there were two laws applicable to the defendant and that he was a major in Calcutta, still there was clearly another law applicable to him under which he was a minor in the Mofussil.

If in construing Act IX of 1875 one only of these laws is to be referred to, which of the two is it that is to govern his case? If either or both of them, then under one law of one part of British India he was still a minor.

The word "majority" as here used must mean, in my opinion, complete majority, majority for all purposes and in all places in British India in the case of a person subject to the Act.

The Act of 1875 extends to the whole of British India and to any domiciled subject in British India, and with two exceptions fixes the age of majority for all at 18.

The exceptions are that where a guardian of the person or property has been or shall be appointed by any Court of Justice, or where the individual is under the jurisdiction of the Court of Wards the age of majority is further extended to the completion of the age of 21.

I am of opinion, therefore, that the defendant was a minor when Act IX of 1875 came into force, and that as there was a guardian of his property appointed by the Court at Patna, the exception in section 3 came into operation and that he was a minor when he signed the promissory note, then being under the age of 21 years, and being a minor, he was incapable under section 11 of the Contract Act of 1872 of binding himself.

Consequently in my view of the case the suit must be dismissed on this ground with costs.

[CIVIL APPELLATE JURISDICTION.]

1881. *March* 17*th*.

No 1685 of 1879.

LOCHUN CHOWDHRY AND OTHERS (DEFENDANTS) APPELLANTS

AND

ANUP SINGH (PAINTIFF) ..... RESPONDENT.

Onus of Proof—Suit for rent—Rent, Proof of rate of.

In a suit to recover arrears of rent from the defendants who, ticcadars of the plaintiff's share in a certain mouzah, had been possession from 1262 to 1281 without having paid any rent, t plaintiff who claimed a bhowlee rent at the rate of 9 annas of t crop, proved that in the mouzah in question the ryots paid rent that rate.

Held, that under the particular circumstances, the *onus* was the defendants who alleged that the proper rate was 8 annas prove their allegation.

APPEAL against a decree of the Additional Judge of Pat dated the 28th of May 1879, modifying the decree of the Sub dinate Judge of that district.

R. E. Twidale, for the Appellants.

Moonshee *Serajul Islam*, for the Respondent.

The facts sufficiently appear from the judgment of the H Court (1) which was as follows :—

This was a suit for rent. The plaintiff alleged that he w 6½ annas shareholder of mouzah Nisf Hossainpore ; that by a pri partition the lands of his share were held by him separately f the other shareholders ; that his share was held in ticca from 1 to the beginning of 1281, by the defendants ; that while the de dants were in possession of that share as ticcadars, they cultiv 55 bighas 8 cottahs of land within it ; that when the term of ticca expired, the plaintiff was resisted in taking possession of aforesaid land whereupon he instituted a suit, but the result of litigation was that the defendant's jote right in respect thereof established and the plaintiff's suit for khas possession dism

(1) MITTER and MACLEAN, *JJ*.

1881.

LOCHUN CHOWDHRY v. ANUP SINGH.

Judgment.

he plaintiff now brings this suit to recover arrears of rent alleging at the lands in mouzah Nisf Hossainpore are held by the tenants der the bhowlee system, that the Hakimee or landlord's share the crop is 9 annas and the tenant's share 7 annas. He calcula- l accordingly, the rent of the land for the years in suit, and he mits that he never realised any rent from the defendants. The fendants alleged that they had all along divided the crops in al shares between themselves and the parties entitled to receive t in respect of the plaintiff's share, that in the years in suit the ps had been thus divided and the plaintiff had obtained his share. regards this last plea the Courts below have found it against e defendants; and on the question whether the Hakimee share s 9 annas or 8 annas, the Courts below holding that it was an mitted fact that in the mouzah in question the ryots pay 9 nas of the crops as the Hakimee share, and that it was not tablished by the defendants, that they had hitherto paid in e proportion of 8 annas decided that question in favor of the aintiff.

In this second appeal, it is contended that the *onus* of proof th reference to this last-mentioned point was upon the plain- f, and that the Courts below have erred in not throwing the *us* upon him. No doubt in an ordinary case when a landlord ings a suit to recover rent, it is for him to establish the rate which he is entitled to recover if there is any dispute as to the e, but having regard to the particular circumstances of this case, ., that the defendants were in possession as ticcadars from 1262 1281 and according to the plaintiff's case, he had never realised r rent from the defendants whose tenancy has been established the previous litigation between himself and the defendants, we nk that the plaintiff must be deemed to have started his case having proved that 9 annas is the ordinary Hakimee share in village; and that it was for the defendants to prove their special that as regards maliks Kashtkar the proportion is 8 annas not 9 annas.

In this view of the case, we think we ought not to inter- with the judgments of the Courts below.

The appeal is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

1881. *Feb.* 25*th.*

No. 307 of 1879.

MUNBASI KOER AND OTHERS, (DEFENDANTS) ... APPELLANTS

AND

NOWRUTTUN KOER AND ANOTHER, (PLAINTIFF) RESPONDENTS

Mitakshara joint family—Mortgage by Mitakshara father having a son—Decree against Mitakshara father in representative capacity Parties—Money Decree on Mortgage—Mortgage Decree—Limitation.

The purchaser at a sale held on the 14th September 188 execution of a decree in the form of a money decree, obtained a mortgage bond executed by the father of a Mitakshara j family during the minority of his only son, having failed to ob possession of the property mortgaged, brought a suit for posses and under a decree made in that suit obtained possession in No ber 1866.

In July 1878 the wife and son of the judgment-debtor brou suit to recover possession from the purchaser of 3rds of the pr ty on the ground that the auction purchaser was entitled on the share of the mortgagor.

Held, that the suit having been brought within 12 years the date in which the defendant obtained possession was not b by limitation.

Held also, that there was no difference between a money-d passed upon a mortgage bond and a decree on such a bond exp ly declaring a lien upon the property mortgaged, and therefore passed to the purchaser at the execution sale was the intere the mortgagor and mortgagee together.

Held, further, that in as much as the son having been a m at the date of the mortgage and of the decree thereupon, father must be considered to have acted as manager, and as su have mortgaged the whole interest of the family, the decree be treated as a decree against the father in his represent capacity, and that the plaintiffs had therefore no interest l the property.

1881.

MUNRASI KOER v. NOWRUTTUN KOER.

Judgment.

PEAL against a decree passed by the Subordinate Judge of ıffurpore, dated the 5th of July 1879.

C. *Gregory* and Moonshee *Mahomed Yusoof*, for the Appellants.
Baboo *Kali Kissen Sen*, for the Respondents.

The facts are sufficiently stated in the judgment of the High : (1) which was as follows :—

This suit was brought by the plaintiffs Musst. Nowruttun Koer, ife and Lalla Rajdhari Pershad, the son of Lalla Gopee Lal over possession of a ⅔rd share by a partition of the entire r property which had been in the possession of Gopee Lall and n the second plaintiff, before the defendant took possession a sale in execution of a decree. The plaintiffs' case is that Jussuduck Hossein and others obtained two decrees against ı Lal on the 14th September and 10th December 1861 re-vely and in execution of these decrees Gopee Lall's interest ıld on the 21st of September 1863 and purchased by the lant who then brought a suit against Gopee Lall and others over possession of it and obtained a decree. In execution of lecree the defendants obtained possession of the whole of the r property in the month of November 1866, and hence the iffs have brought this suit alleging that the purchasers ed only the father's interest.

he defendants amongst other pleas urge that the plaintiffs' was barred by limitation, because the suit was brought on h of July 1878, more than 12 years after the auction sale, so that what was sold on the 21st of September 1863 was not erest of the father Gopee Lal only, but the entire family ty. The Lower Court overruled the plea of limitation and pon the other plea that what passed was only the father's t. The Lower Court accordingly awarded a decree in favour plaintiffs.

oth these objections have been again raised before us by the ants, appellants. Upon the question of limitation we agree he Lower Court that the plaintiffs' claim cannot be thrown on that ground, because it appears to us that in the suit

(1) MITTER and MACLEAN, *JJ.*

1881.

MUNHASI KOER v. NOWRUTTUN KOER.

Judgment.

which was brought by the defendants after their purchase, admitted that notwithstanding the auction sale Gopee L father, continued to remain in possession by setting up fra deeds. It appears upon the admission of the defendants the in that suit that the family remained in possession till N 1866 when the decree was executed.

The present suit having been brought within 12 yea that date is not barred by limitation. But we are of opini the decision of the Lower Court upon the other point is erro

We find that Jussuduck Hossein and others obtained a against Gopee Lall and others upon a bond, dated the 5th vember 1858 which mouzah Mujlispore Toi was mortgaged suit was decreed in the following terms: "that the plaintif "taking out execution of this decree do realize from the def "the sum of Rs. 327-9-1 principal with interest, mentioned "plaint as well as interest *pendente lite* only upon the p "amount mentioned above at the rate of 1 per cent. per "until the day of realization, besides costs with interest "aforesaid rate." The other decree mentioned in the pla obtained by the same plaintiff Syed Jossuduck Hossein and against Gopee Lal and Ram Sumrun Singh. The claim a refund of Rs. 454-1½ being the zuripeshgi money due t ticca lease, dated the 2nd December 1858.

It is doubtful whether this last decree at all created an gage lien upon the property. We do not know whether t perty in dispute was hypothecated in the lease referred to but it seems to us that the first mentioned decree upon th was a decree by which the mortgaged property was sol because it has been decided by the Full Bench decision rep 22 W. R., 187 that there is no difference between a decree fo passed upon a mortgage bond, and a decree expressly d lien also based upon a similar mortgage bond. It was dec what is sold under either of these decrees was the same namely, the interest of the mortgagee and the mortga together. That being so, we think that we must treat of the 14th of September 1861 as a mortgage decree, an perty in dispute having been sold in execution of according to the principle laid down in the case of K

1881.

MUNRASI KOER v. NOWRUTTUN KOER.

Judgment.

Maddun Thakoor it must be held that what was sold under it was the family property. The son was admittedly a minor at that time, and the father having mortgaged the whole of the family property, must be considered to have acted as manager of the family, and the decree must also be treated as a decree against him in his representative character, that is to say, as representing himself and his minor son.

In this view of the decree of the 14th of September 1861, and the execution sale held under it, it is clear that the plaintiffs have no interest left in the property.

The judgment of the Lower Court must therefore be reversed, and the plaintiffs' suit dismissed with costs.

[CRIMINAL JURISDICTION.]

1881.
May 20th.

S
No. 323 of 1881.

IN THE MATTER OF MOHUR MANDAR ... . PETITIONER.

Criminal Procedure Code, Act X of 1872, sections 521 and 525—Evidence—Procedure.

Where a person to whom an order has been issued under section 521 of the Code of Criminal Procedure, appears to show cause against such order, the Magistrate is bound to take evidence under section 525 of the Code.

REFERENCE submitted by the Sessions Judge of Bhaugulpore the 14th May 1881 for the opinion of the High Court. The circumstances were as follows :—

On the 23rd February 1881 Jadunath Panday complained to the Magistrate of the District that Mohur Mandar had closed a road to the inconvenience of him and others. Some enquiries and orders followed, and on the 24th March 1881 the District

1881.

In re of MOHUR MANDAR.

Statement.

Magistrate passed the following order "Under section 521, an order to Mohur Mandar to remove the obstruction, or to a before the Joint-Magistrate within 3 days of receipt of or shew cause why it should not be carried out." The Joint-Magi did not deal with the case. Mohur Mandar appeared and p a petition of objection, dated the 30th March, and the D Magistrate on the 6th April made an order that "The objec not good. The road must be opened at once, and if this is no within 3 days, the Police will open it out at the objector's ex The cost if not paid can be recovered under section 525." I represented to the District Judge that the order was illega cause the present petitioner having appeared to shew cause a the order under section 521, the Magistrate was bound under s 525 to take evidence before he could make the order under s 521 absolute. The District Judge considered that under th it was imperative on the Magistrate to take evidence, when in a to an order under section 521 the person called upon appea shew cause against the order. Under the circumstances, the he referred the matter to the High Court.

The order of the High Court (1) upon the Reference v follows :—

The order of the 6th April is clearly opposed to secti which directs the Magistrate to take evidence when the per whom an order under section 521 has been issued appears to cause against the same. In this case the person Mohur M did shew cause, but no evidence was taken.

The order of 6th April is set aside.

(1) MITTER and MACLEAN, *JJ.*

[ORIGINAL CIVIL JURISDICTION.]

1881.
May 4th.

No. 539 of 1880.

. F. N. WATKINS AND OTHERS ..... PLAINTIFFS;

AND

HUNNOO BABOO..... DEFENDANT.

nfant—Necessaries—Costs of legal proceedings on behalf of infant, whether necessaries—Contract Act, IX of 1872, *section* 68.

Where costs are properly incurred on behalf of an infant in maintaining or defending a suit in which his property is involved, such costs are recoverable as necessaries within the meaning of section 68 of the Contract Act from the infant's estate.

THIS was a suit instituted by the surviving partner and the dministrators of the estate of Mr. W. C. Trotman the deceased rtner in the late firm of Messrs. Trotman and Watkins to recover om the defendant, who was an infant of about 7 years of age, e sum of Rs. 1,464-4 due upon a Bill of Costs.

The costs, the nature and particulars of which were set out the plaint were incurred by the late firm of Messrs. Trotman d Watkins as attorneys for the defendant in a suit, being suit . 19 of 1867, which was instituted by one Panch Cowrie ll and others against the present defendant and others. In t suit Mr. C. F. Pittar an attorney of the High Court was ap-nted guardian *ad litem* of the infant defendant, and Messrs. tman and Watkins were employed as his attorneys.

The suit was dismissed with costs, as also an appeal preferred the plaintiffs against the decree made in the suit.

The taxed bill of costs furnished by Messrs. Trotman and tkins in respect of the suit and appeal, amounted to the sum of 1,464-4.

A writ of attachment was issued against the plaintiffs in suit of 1877 for the recovery of that sum, but as the plaintiffs in t suit could not be found, and there was no property belonging to m which could be attached, that writ was never executed.

1881.

A. F. N. WATKINS v. DHUNNOO BAHOO.

Judgment.

The present plaintiffs now claimed the amount from the est the infant on the ground that the costs which had been inc were necessaries within the meaning of section 68 of the Co Act.

Trevelyan, for the Plaintiffs.

T. A. Apcar, for the Defendant.

The following judgment was delivered by—

BROUGHTON, *J.*

BROUGHTON, *J.*:—The plaintiffs, attorneys of this Court, to recover Rs. 1,469-4-0 with interest on account of certain incurred by them in defending a suit for the present defe who was, and still is, an infant under age.

They contend that these costs are "necessaries" withi meaning of the Indian Contract Act, section 68, which enacts "if a person, incapable of entering into a contract is su by another person with necessaries suited to his condition in the person who has furnished such supplies is entitled to b imbursed from the property of such incapable person."

The infant, on the 8th of April 1876, through his mothe next friend sued his uncle for an account and partition of the of his grandfather, and a decree was made by consent o 28th of July 1876 for partition. It was directed that the in share should be delivered to the Receiver of this Court. M F. Pittar an attorney of this Court was substituted f mother as the next friend of the infant. The partition was and the property allotted to the defendant is now in the ha the Receiver.

Afterwards, on the 20th of March 1877, one Panch G Mull and others sued the infant and others, praying that th of one Hoolarsee Lall might be construed, and that the rig the plaintiffs as members of a certain Punch and the other re trusts under this will might be ascertained, and that if nec this suit might be treated as supplemental to the former suit

In this second suit Mr. Pittar also was appointed gu *ad litem* for the infant.

This second suit was dismissed with costs. The pl appealed, and ultimately the appeal was dismissed also with

Attempts have been made to execute these decrees for

1881.

A. F. N. WATKINS v. DHUNNOO BABOO.

Judgment.

BROUGHTON, J.

but the persons against whom this execution was sought cannot be bound and have no property.

If Punch Cowrie Mull had succeeded in his suit, the property djudged to the infant in the first suit would have been swept way.

There was, however, a good defence to the suit, and it was herefore necessary in the ordinary acceptance of the term that roceedings should be taken to protect the interests of the infant om this attack which was made on his property.

A proper and responsible person was appointed to act as uardian to the infant, and to see that no unnecessary proceedings ould be taken on his behalf, and the guardian protected himself om personal liabilty by an agreement with the present plaintiffs ho were retained by him to act as attorneys for the infant defen- nt.

It is contended upon the authority of a case decided by HEAR, *J.*—*Radhanath Bose* v. *Suttoprosono Ghose*, 2 Ind. Jur. N. , 269 and a late case decided by WHITE, *J.* on the 8th of June 1880, *enonath Bose* v. *Ruggosbaidial Singh* (not reported,) that these sts, although they have been properly incurred in defending an tion which ought to have been defended, are, nevertheless not asonable.

In the first case PHEAR, *J.* held that there was no contract , or on behalf of the infant, and the reasons are given why infant is not permitted to enter into this particular contract but st act vicariously under the established rules of Court. These es are now embodied in the Code of Civil Procedure, Act X of 77; and the Contract Act, section 11, does not allow an infant to er into any contract.

In the case decided by WHITE, *J.* it appears that the guar- was also a party to the suit and that the infant's estate was is hands.

The notes of the judgment are very short, and as I under- d them, it was held that the decree should be against the dian and that he could recoup himself out of the infant's estate.

The defendant in this case comes within the description of "a n incapable of entering into a contract" and the question is her the work done for him by the plaintiffs comes under the of "necessaries."

1881.

A. F. N. WATKINS v. DHUNNOO BABOO.

Judgment.

BROUGHTON, J.

It has been decided in the case of *Collins* v. *Brook*, 5 H. and N., 700, cited by Mr. Trevelyan that payment made to avoid arrest is a necessary. In *Brown* v. *Ackroyd*, 5 E. and B., 819 a suit to protect the person from violence was considered in the same way, necessary.

In *Wilson* v. *Ford*, L. R., 3 Exch., 63, it was contended that *Brown* v. *Ackroyd* went as far as the law allowed in this direction, but it was considered by the Barons of the Exchequer who were unanimous that where a wife had been deserted by her husband who had deprived her of her property, and where she had failed in her endeavours to persuade him to return to her and had instituted proceedings for restitution of conjugal rights, the costs of all reasonable proceedings incurred in this manner were necessaries, including the expenses of taking Counsel's opinion upon the construction of a settlement and expenses incurred by her to protect the husband's property from a distraint. If an infant is liable for necessary food and raiment suitable to his condition in life on the ground that they are necessaries, it would be strangely anomalous if the law were to hold that proceedings properly taken to preserve him from complete ruin and destitution must be taken at the risk and expense of those persons who act for his benefit, and who may or may not recover the money so spent as the infant on coming of age may chance to approve of or repudiate the arrangements, and be willing or unwilling to repay them.

I think that the case in the Law Reports, 3 Exch. 3, *Wilson* v. *Ford*, is sufficient authority for the proposition that the costs of a proper suit, or defence of a suit in which property is involved, are recoverable from the infant's estate, and as the costs appear to have been taxed and to be reasonable in the present instance, the plaintiffs are entitled to succeed. It was, however, very right that the question should have been discussed. The costs of both parties must be paid out of the estate of the infant, the infant's costs being as between attorney and client.

[ORIGINAL CIVIL JURISDICTION.]

BHOY CHURN SEN ..... PLAINTIFF; 1881. *May 19th.*

AND

EBENDRONATH MULLICK ..... DEFENDANT.

ortgage, Redemption of—Costs as between party and party—Practice —Mortgage suit.

In a suit upon a mortgage of certain property, A who had purchased the property in question, subject to the mortgage sued upon, in execution of a decree upon another mortgage, paid off the amount due to the plaintiff for principal and interest, and applied to the Court that he might be made a party, and that upon his paying the plaintiff the costs of the suit to be taxed as between party and party, the plaintiff should be directed to re-convey the property to him free from all encumbrances.

Held, that the practise was to make the costs in such circumstances payable as between attorney and client, and not as between party and party.

[HIS was an application made under the following circumstances: n the 14th of February 1881 one Obhoy Churn Sen filed a it in the High Court against Debendronath Mullick and eeressur Dutt, praying *inter alia* that an account might be taken what was due under an Indenture of Mortgage, dated the 15th ay 1876 by which certain premises No. 83 Clive Street were ortgaged to him by the defendant, Debendronath Mullick, and r payment of what might be found due on the taking of e accounts, and for an injunction to restrain until the further der of the Court the defendant Beeressur Dutt from proceeding th a certain suit No. 118 of 1880. That suit was instituted on e 18th February 1880 against the defendant Debendronath Mullick Beeressur Dutt for the purpose of recovering Rs. 19,164 due on o mortgages of the same premises, dated respectively the 6th bruary 1878 and 14th March 1878, and a decree was made therein the 8th April, by which it was directed that if default should

1881.

OBHOY CHURN SEN v. DEBENDRO-NATH MULLICK.

Statement.

be made in payment of the amount found due to the defend Beeressur Dutt, the premises should be sold.

An application was made by the plaintiff in this suit for order in terms of the prayer in his plaint restraining the defend Beeressur Dutt from further prosecuting his suit, but his applicat was dismissed with costs on the 17th February 1881.

The premises were sold on the 18th of the same month a purchased by one Gopal Chunder Dutt for Rs. 19,000 and Rs. 5,0 were paid by way of deposit. An order was made in the suit No. 1 of 1880 on the 18th March following, that Gopal Chunder sho be at liberty to pay the balance of the purchase money and the s was confirmed.

It appeared that Beeressur Dutt was the uncle of Gopal Chund Dutt, and the latter arranged to pay off the amount due to t plaintiff Obhoy Churn Sen for principal and balance of inter and costs, and obtain a re-conveyance.

Gopal Chunder Dutt accordingly applied for an order th he might be joined as a party defendant to the suit, and asked th in as much as he had paid to the plaintiff Obhoy Chunder Sen t principal and balance of interest due upon the mortgage dated 24 November 1876 and executed by the defendant Debendronath favor of the plaintiff, he might be at liberty to pay the plaint the costs of the suit to be taxed as between party and party, a that upon his doing so the plaintiff might be directed to re-conv the premises to him, Gopal Chunder Dutt, free from all encumbranc

Bonnerjee moved, and asked that in terms of the notice giv the costs directed to be paid by his client should be as betwe party and party.

Jackson objected that his client was entitled to costs as tween attorney and client. That was the practice under A VIII of 1859 and he submitted there was nothing in the new Co or in the circumstances of the present case to warrant a change the practice. *Chunder Coomar Chatterjee* v. *Essenchunder Chatt jee*, 1 Ind. Jur., 222.

Bonnerjee in reply.

WILSON, *J.* (after taking time to consider): The practice I find, to make costs as between attorney and client.

[ORIGINAL CIVIL JURISDICTION.]

H. ROBARTS ..... PLAINTIFF; 1881. *April 4th.*

AND

O. STEEL AND OTHERS, ... DEFENDANTS.

Arbitrators, Application by for sanction of Court as to costs—Reference —Civil Procedure Code, Act X of 1877 *Chap. XXXVII.*

The Court has no power under the provisions of the Code of Civil Procedure to sanction an order passed by the arbitrators to whom a matter has been referred, making the payment of their fees a condition precedent to their hearing the reference.

THIS was an application made on behalf of the arbitrators in certain matters known as the Ranchi Lac, Burlah, Panicherra and Stainforth References, for confirmation of an order made by them on the 21st March 1881.

It appeared that the arbitrators had made their award in the Burlah Reference and that their fees amounted to Rs. 8,349. On the 30th September 1880, they gave notice to Messrs. Sanderson and Co. the attorneys for one of the parties that the award was ready, and would be filed on payment of their fees. Messrs. Sanderson and Co. thereupon wrote a letter to Messrs. Remfry and Remfry, the attorneys for the other party, H. Robarts, expressing their willingness to pay their client's share, and desiring that Messrs. Remfry and Remfry should pay their client's share, so that the award might be filed. To that letter, Messrs. Remfry and Remfry replied, that it was not the duty of their client to take up the award.

The award on the Burlah Reference not having been taken up, the arbitrators on the 21st March 1881 proposed to pass the following order in the Panicherra and Stainforth References which were then before them, both parties to the Reference being represented by their attorneys.

"Panicherra and Stainforth References.

Ordered, subject to the sanction of the Court being obtained, without prejudice to any order or award that may hereafter be made

1881.

H. ROBERTS v. O. STEEL.

Statement.

as to how the costs of these References and awards are to be he paid or borne by the parties, the parties do pay the arbitrators' these two References (to be fixed) by the arbitrators in equal that is to say, one half by Messrs. Sanderson and Co.'s clie the other half by Messrs. Remfrys' client; and that the arbi fees for every subsequent meeting be paid by the parties in tl proportion before such meeting is opened. In the event o party not paying the fees hereby directed to be found, the arb will proceed *ex-parte* on the Reference or References as to default shall be made at the instance of the party who shall p fees. Messrs. Sanderson and Co. are directed to apply to th for the sanction required to the arbitrators' order; and the arb direct that their costs of such application be costs of the Re whatever may be the result."

Mr. Remfry on behalf of his client protested at the i against this order on the ground that there was no provi the deed of submission for prepayment of fees. The arbi however, were of opinion that the power which was give under clauses (1) and (3) of the deed of Submission "to r the proceedings" authorized the course which they propo they accordingly passed the order.

An application was now made in terms of the order firmation by the Court.

Allen, for the Arbitrators.

Bonnerjee opposed the Application.

Allen:—The power to regulate the proceedings give arbitrators by the deed of submission is sufficient authority course taken.

[WILSON, *J.*:—If the arbitrators have such ample why ask for the sanction of the Court? Is there any s for the Court interfering?]

The arbitrators are officers of the Court, and are en make this application as to the matters referred to them.

[WILSON, *J.*:—The Court has power only in certain stances to set aside the award when it has been made.]

Bonnerjee:—The Court has no power to interfere in By section 514 of the Civil Procedure Code, the Court

1881.

H. ROBARTS v. O. STEEL.

Judgment.

the time for making an award, or it may pass an order under certain circumstances superseding the arbitrators. Then section 523 lays down the procedure where an award made under an agreement, has been filed, but there is no section which warrants an application such as the present being made to the Court.

It cannot be said that this is a special case submitted to the Court under section 517.

WILSON, *J.* :—I do not think the Court has power to interfere.

It appears to me that when a matter is before arbitrators it is out of the hands of the Court, except so far as power to interfere is given by the Civil Procedure Code. That Code does in certain cases give the Court power to interfere in matters referred to abitrator. But there is no provision which authorises such an application as the present.

I desire to guard myself from expressing any opinion as to the propriety of the line which has been adopted.

The application must be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

OLAM MOSTOFA AND OTHERS (DEFENDANTS)... APPELLANTS;

AND

OBURDHONE MULLA AND OTHERS (PLAINTIFFS) RESPONDENTS.

1881. *March 30th.*

No. 4 of 1880.

ift, deed of—Hibabilawaz—Consideration nominal—Bill of Sale—Registration Act III of 1877 *section* 17 *cl. (a).*

A *hibabilawaz* although made on the nominal consideration of "a *than* of cloth and natural love and affection" is merely a deed of gift and as such must be registered.

PPEAL from a decree of the Subordinate Judge of the 24-gunnahs, dated the 24th September 1879 affirming the decree the second Moonsiff of Alipore, dated the 27th of December 78.

1881.

GOLAM MOSTOFA v. GOBURDHONE MULLA.

Judgment.

This was a suit to recover possession of a share in certain land. The plaintiffs alleged that one Bhikun Mulla was the former owner of the land, and that on his death they had inherited portion of the share claimed, and had since purchased the remainder from his sister Rutten Bibi, she having inherited it on the death of his widow Suttra Bibi.

Among other defences it was alleged that Rutten Bibi was not the heir of Suttra, that Suttra Bibi had been for more than 12 years in exclusive possession of the property left by Bhikun Mulla and had made a *hibabilawaz* in favor of the defendants on the 2nd Pous 1284.

This *hibabilawaz* was expressed to be given on the consideration of "a *than* of cloth and natural love and affection."

The Lower Courts refused to admit this document in evidence, on the ground that it was insufficiently stamped, it being engrossed on a one-rupee stamped paper whereas, it was held, it ought to have been stamped under Act XVIII of 1869 as a deed of gift with a Rs. 16 Stamp, and further that it ought to have been registered.

The defendants appealed on the ground that the Courts below should have held that *hibabilawaz* was really a deed of sale, and therefore sufficiently stamped.

Moulvi *Serajul Islam*, for the Appellants.

Baboo *Opendro Chunder Bose*, for the Respondents.

The judgment of the High Court (1) was as follows:—

We are of opinion that the Subordinate Judge in this case is correct in holding that the *hibabilawaz* was a deed of gift and required registration under the Registration Act. It has been argued before us that a nominal consideration of "a *than* of cloth and natural love and affection" are sufficient to render it a deed of sale and to take it out of the category of deeds of gift.

We think that considerations like this are, for all practical purposes, to be treated as merely nominal. Therefore this is neither more nor less than a deed of gift, and as such, requires registration under the Act.

This appeal is dismissed with costs.

(1) PONTIFEX and FIELD, *JJ.*

[CIVIL APPELLATE JURISDICTION.]

RNA CHUNDER SEN, ... APPELLANT ;

AND

OSUNNO CUMAR DASS AND OTHERS, ... RESPONDENTS.

1881.
April 8th.

No. 43 of 1880.

lorney, construction of Power of—Mortgage or sell, Power to—Bond.

A granted a power of attorney authorizing certain persons "to sell or mortgage any portion of my estate at their discretion for the payment of my debts."

Held, that the instrument did not authorize the execution of a simple money bond.

PPEAL from a decree passed by the Subordinate Judge of ittagong, dated the 3rd December 1879.

Under a power of attorney granted by the defendant Purna nder Sen empowering his uncle Ram Sunder Sen and his sins Goru Chunder Sen and Ram Chunder Sen "to sell or mort-e any part of his estate at their discretion for the payment of debts," two simple money bonds were executed, one for Rs. 3000 able within one year, and the other for Rs. 580 payable in nonths, both with interest at 24 per cent. per annum.

In a suit upon the bonds the Subordinate Judge held that the er of attorney authorized the execution of the bonds and gave plaintiffs a decree against Purna Chunder Sen.

Purna Chunder thereupon appealed against the decree.

Baboo *Mohiney Mohun Roy* and Baboo *Aukhil Chunder Sen*, the Appellant.

Baboo *Chunder Madhub Ghose* and Baboo *Hurry Mohun ckerbutty*, for the Respondent.

The judgment of the High Court (1) was as follows :—

Two questions arise on this appeal. One is purely a question w, and the other a question of fact.

We will deal with the question of law first, namely, whether r the power of attorney which was given by the defendants to uncle and two cousins on the 25th October 1875 he gave them authority to enter into such a bond as that which forms the

(1) GARTH, *C. J.* and MCDONELL, *J.*

1881.

PURNA CHUNDER SEN v. PROSUNNO CUMAR DASS.

Judgment.

subject of this suit. This question depends upon the language and the true meaning of the power.

Now it has been contended by the learned Pleader for the plaintiff that this authority was given to the attorneys to sign such a bond in one or other of two ways. He says first, that the power authorizes Ram Soonder Sen and others to *sell or mortgage* any part of Poorna Chunder Sen's estate *for the payment of his debts*; and that there being a power to sell or mortgage his estate for the payment of his debts, there is also a power given by implication to give a simple bond for the same purpose. But we are bound to construe the language of an instrument of this kind with reasonable strictness; and we think it is impossible to say that a power to sell or to mortgage property for payment of debts includes a power to give a simple money bond which is an instrument of a totally different nature and which in fact *is not a means of paying debts* at all.

Then, secondly, it is argued that the latter portion of the power gives authority to execute such a bond. The words are "Granting "to my attorneys full power and authority to take such legal or "any other course at their discretion towards recovery, receiving and "obtaining of any dues and payment of my debts, as I myself might "or could do were I personally present."

It is contended that these words confer upon the attorneys authority to take any course, legal or otherwise, for the purpose of paying the debts of Poorno Chunder. But in fact they mean a totally different thing. The clause relates evidently to obtaining payment of the debts due to Poorno Chunder and not to paying debts due from him.

The Subordinate Judge has made a very palpable mistake in this respect; and we are sorry to say that he has dealt with both the questions in the case in a very loose careless manner quite unworthy of a Judicial Officer. This is by no means the first occasion on which we have had reason to notice the ill-considered judgments of this gentleman.

The other question in the case is one of fact which, having regard to our construction of the power of attorney, it is not really necessary for us to decide. But as it has been argued on both sides, we think it better to state shortly our views upon it.

[The Court then considered the evidence and in the end dismissed the plaintiffs' suit.]

[CIVIL APPELLATE JURISDICTION.]

ADU SHAUT AND OTHERS, (DEFENDANTS)..... APPELLANTS ; 1881. *March 28th.*

AND

KADUMBINI DASSI, (PLAINTIFF)..... RESPONDENT. Nos. 114 & 115 of 1880.

Rent, Suit for Share of—Co-sharers, Suit for rent by one of several.

The plaintiff's co-sharers in a certain mouzah, the rents of which were collected jointly, having dismissed the agent by whom the joint collections were made, and appointed a new agent, the plaintiff refused to recognise the new agent, and gave notice to the ryots not to pay her share of the rent to him. The ryots thereupon withheld payment of her share altogether, and the plaintiff therefore brought a suit to compel the payment of it.

Held, that the suit would not lie.

Sheikh Gani Mahomed v. *Moran*, 2 C. L. R., 370.

APPEALS from decrees passed by the District Judge of Midnapore, dated the 10th September 1879, affirming a decree of the Moonsiff of Tumlook, dated the 25th January 1879.

The plaintiff who was a minor and one of several co-sharers, brought the two suits out of which these appeals have arisen, through her next friend, to recover the rents of her share in two mouzahs which formed part of the estate of herself and the other shareholders.

It appeared that formerly the rents of the whole mouzah had been collected by a gomastah on behalf of all the co-proprietors, but that the other co-proprietors had recently discharged that gomastah and appointed another without the plaintiff's consent.

On the former gomastah being dismissed, notice was given to the ryots on behalf of the plaintiff not to pay her share to the new gomastah. The result was that the plaintiff's share in the rents were withheld altogether.

The Moonsiff was of opinion that the rents were withheld in collusion with the other co-sharers, and that the case therefore

1881.

JADU SHAUT v. KADUMBINI DASSI.

Judgment.

did not come within the ordinary class of cases in which it was la down that the co-sharers on an estate could not, in the absence an arrangement, harrass the ryots of the joint estate by each brin ing separate suits for their respective shares of the rents. I accordingly gave the plaintiff a decree in both suits. These decre were affirmed by the District Judge. He considered that the ca were governed by 21 W. R., 46; that the interruption in the collecti had proceeded from the other co-sharers, and that the plaintiff oug not to be prejudiced by their appointing a separate gomastah collect their own shares. Thereupon these second appeals were pr ferred by the defendants.

Baboo *Oma Kali Mookerjee*, for the Appellants.

Baboo *Gopee Nath Mookerjee*, for the Respondent.

The following judgments were delivered by the Hi Court (1):—

CUNNINGHAM, *J.*:—The plaintiff in this case, on behalf of l minor daughter-in-law, along with other co-owners was in habit of receiving rent jointly through a common agent. T other co-owners dismissed this agent and appointed another; thereupon the plaintiff gave notice to the tenants not to pay share of the rent, and she now seeks to enforce payment aga them. This it appears to me is contrary to the law laid down series of decisions and especially in the Full Bench decisio *Sheik Gani Mahomed* v. *Moran*, 2 C. L. R., 373.

I think therefore that the decision of the Lower Court mus set aside, and the plaintiff's suit dismissed with all costs.

This judgment will govern appeal from Appellate De No. 11 of 1880.

PRINSEP, *J.*:—The decision of the Lower Appellate Court this point is clearly wrong, for, as pointed out in the Full Be decision in *Sheik Gani Mahomed* v. *Moran*, 2 C. L. R., 373, "it "been constantly held in this Court, and must be considered "as well established law that each co-sharer may bring a sepa "suit against the tenant for his share of the rent. But in "absence of such an arrangement" (that is, an arrangement betw tenant and co-sharers under which the tenant agrees to pa

(1) CUNNINGHAM, and PRINSEP, *JJ.*

1881.

JADU SHAUT v. KADUMBINI DASSI.

Judgment.

portion of the rent to each co-sharer in respect of his separate share) "it is equally clear that no such suit can be maintained."

In the present case the plaintiff having hitherto realized rent jointly with other co-sharers seeks to realize it separately from the tenant on her alleged specific share without any such arrangement. He clearly could not do so, and should follow the course laid down in the decision reported in 22 W. R., 394. I therefore agree in dismissing the plaintiff's suit with costs in all the Courts.

[CIVIL APPELLATE JURISDICTION.]

1881.
April 8th.

No. 305 of 1879.

AND MORTGAGE BANK., LD., (PLAINTIFFS) APPELLANTS;

AND

DY LUCHMIPUT SINGH, (DEFENDANT) ..... RESPONDENT.

Mahomedan, Right of Creditor of deceased—Purchase bonâ fide from heir of deceased Mahomedan.

The creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bonâ fide* purchaser from his heir.

Syud Bazuyet Hossein v. *Dooli Chund*, L. R., 5, I. A., 211 followed.

APPEAL from a decree passed by the Subordinate Judge of Krishnaghur, dated the 30th June 1879.

Branson and Baboo *Kashi Kant Sen*, for the Appellant.

Baboo *Sreenath Dass* and Baboo *Rash Behari Ghose*, for the Respondent.

The facts sufficiently appear from the judgment of the High Court (1) which was delivered by—

(1) PONTIFEX and FIELD, *JJ.*

1881.

LAND MORTGAGE BANK., LD. v. ROY LUCHMIPUT SINGH.

Judyment.

PONTIFEX, *J.*:—The substantial question in this app whether the creditor of a deceased Mahomedan can follo estate into the hands of a purchaser from his heir, and tha been decided against the appellant by the Privy Council in th of *Syud Bazuyet Hossein* v. *Dooli Chand*, L. R., 5 I. A. and followed by a decision of this Court in Regular A No 2 of 1879, dated the 12th August 1880. No doubt th chaser must be a *bonâ fide* purchaser, and that is the only qu that could be argued in this appeal. The appellants complain on the 18th June 1879 they asked permission of the Lower Co adduce evidence to prove that the defendant's purchase Sharufunnissa was collusive, which was refused. That applic was made three days after the examination of the witnesses o defendant, who was called upon to open his case first, had menced and indeed after the examination of all his witnesses finished. No charge of fraud was made in the plaint althou is clear the plaintiffs had full knowledge of all the previous cumstances of the case, nor was any issue raised upon that que The Subordinate Judge refused to allow the plaintiffs to set case of fraud for the first time on the 18th June 1879. I opinion he was justified in so refusing. If fraud had been ch in the plaint, it might have been difficult to allow the plaint make out any other case. By carefully omitting to charge in the plaint they could not afterwards, after all the issue been settled and the witnesses for the defendant had been exa be allowed to raise, for the first time, the question of fraud the defendant had not been called upon to meet. The appeal be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

1881.
Feb. 15th.

No. 2414 of 1879.

HUROPERSHAD ROY CHOWDHRY (PLAINTIFF) ..... APPELLANT;

AND

UMATARA DABI (DEFENDANT) ..... RESPONDENT,

Second Appeal—Evidence, Improper reasons for disbelieving—Civil Procedure Code, Act X of 1877, section 585—Enhancement of rent on ground of increase in value of produce—Evidence of land-holders as to increased value of produce in suits for enhancement.

In a suit for enhancement of rent on the ground that the value of produce has increased, the evidence of holders of land in the neighbourhood as to the prices at which they have sold their crops from year to year is relevant and ought to be considered, and not rejected in favour of evidence of traders and merchants who speak to the prices obtained in hâts and bazars and other places of trade.

Where the Lower Court has omitted to consider, or has given an erroneous or improper reason for disbelieving, or setting aside as of no value, relevant evidence upon the essential question in a case, the High Court in second appeal is competent to interfere.

Musst. Degumber Dassee v. *Kissen Dhur Nundy*, 1 Ind. Jur. 35; *Gunee Biswas* v. *Sree Gopal Chowdhry*, 8 W. R., 395; *Ram Das Saha* v. *Manmahini Dasi*, 7 B. L. R. App 4; *Ghundhabun Mohunt* v. *Shurut Chunder Roy*, 23 W. R., 160 and *Roop Narainee Koer* v. *Ressae Tewari*, 24 W. R., 119, referred to.

APPEAL against the decree of the District Judge of the 24-Pergunnahs, dated the 14th of August 1879, modifying the decree of the First Subordinate Judge of that district, dated the 26th of May 1879.

Evans and Baboo *Bhowany Churn Dutt* and Baboo *Opendro Chunder Bose*, for the Appellant.

Baboo *Nil Madhub Bose*, Baboo *Amerendro Nath Chatterjee* and Baboo *Saroda Churn Mitter*, for the Respondent.

1881.

HUR PERSHAD ROY CHOWDHRY v. UMARDA DA[illegible]

Judgment.

The facts are fully stated in the judgment of the Court (1) which was as follows:—

This is a suit for enhancement of rent. The defendan tenants, under the plaintiffs, of a holding, which originally sisted of 1202 bighas, and the rent of which was originally fi Rs. 611-1-1 pie. These grounds of enhancement were set the plaint. The first ground is, that the quantity of land h the defendants is more than that for which rent was formerly They say that the quantity of land is now 1900 instead of bighas. The second ground is that the productive powers land have increased; and the third ground is that the value produce has increased.

As to the first two grounds there is no question in the appeal, and the third ground is the only one with which we to deal. That prices, within the last twenty, thirty or forty have increased considerably in these provinces is a matter as to few reasonable people have any doubt. At the same time particular case, it is necessary that evidence of this increase be produced before the Court, which has to decide the ques enhancement; and this evidence must be such as the law to be relevant and admissible.

In the present case the evidence which was produced the Subordinate Judge to prove the increase of the price of the produce was the testimony of a number of witnesses ing to the cultivating class, who stated from memory th which to their knowledge, have prevailed in the locali number of years back. The Subordinate Judge dealt with mony of these witnesses, and upon this evidence he came to conclusion. Whether upon this evidence this conclusion or wrong is a question into which we do not propose to en case then came on appeal before the District Judge of the 24 nahs. The learned District Judge in his judgment first certain arithmetical errors in the calculations of the Judge. He then notices certain matters, which formed of a cross-appeal, and observes that the defendant co the extra expenses of protection of the land from salt w cutting and conveyiug crops to market absorbed the

(1) McDONELL and FIELD, JJ.

1881.

HUROPERSHAD ROY CHOWDHRY v. UMATARA BI.

Judgment.

notices a point which was the subject of argument in the
the hearing of the appeal, namely, that the Subordinate
s incorrect in his method of striking an average. In this
as been said that ten years is too long a period for a fair
nd that five years is a reasonable period. The Judge then
refers to certain former cases instituted for enhancement
t of the lands which form the subject of the present suit.
hus noticed these points he then without definitely dis-
any of them, proceeds as follows: "First as to the
offered by plaintiff to prove increased value and produce,
lesses were examined, none of them hold under defendant.
speaking they hold neighbouring land. They appear to
ntial cultivators with retentive memories. The first gives
of grain thirty-four years ago, and generally gives a com-
tween prices now and then, and intermediately. The rest
the same and the Subordinate Judge swept all their evi-
y, and adopts some of the figures of one witness Panch
I confess I cannot understand why Panch Cowrie is selected,
parently his highest figure is to be taken. The fact is this
dence ought not to satisfy any Court of the relative value of
n any given period. I do not know a more difficult
inquiry, and I have frequently held, and I see no reason
e of opinion that the price of grain during a long or short
ears must be proved by the evidence of men who have
more than memory to fall back upon. We have nothing
the quantity of produce, in which case the evidence of
cultivators might be of more value than that of grain-
Value of produce can and should be proved by traders
hants with books of accounts by which memory could be
nd tested. I shall therefore hold that the evidence in this
afe guide to the value of produce and cannot be acted

t has been contended on the part of the appellant that
Judge has here prescribed a general rule as to the
be given in this class of cases; that he has in fact said
not consider or take into account any evidence which
y of the oral testimony of witnesses of the cultivating
t the only evidence which he will regard as relevant in

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Judgment.

an enquiry of this kind, is the evidence of traders and merc with books of account, by referring to which they may r their memory. It is said that the Judge cannot thus mak himself new rules of evidence, and that is our duty to set a judgment based upon reasoning which starts with a mistaken of the relevancy of evidence.

On the other hand it has been argued that the remarks District Judge, which we have above quoted were not intend lay down any general rule as to the kind of evidence relev this class of cases, but that they are to be read merely as ob tions dealing with the witnesses and the evidence in this part case, and stating the grounds upon which the Judge consider evidence to be unworthy of credit, and it has been further a ded that as the Judge has disbelieved this evidence, we are by this finding, and cannot on second appeal question the g of the Judge's disbelief.

It appears to us that even if the District Judge did not intend to say that he would absolutely refuse to consider ev of the nature of that produced by the plaintiff, he has yet, strong feeling of preference for another species of evidence a duced, virtually done this so far as the present appellant i cerned that he has substantially omitted to consider the e upon the record, and this for a reason, which cannot be sup the reason, namely, that the fact to be proved ought to b by evidence of another kind than that produced. We entir doubt that in thus putting aside and omitting to consider vant evidence actually produced upon the essential questio case, the District Judge has committed an error in law are competent and indeed bound to deal with on secon Some cases have been cited to us to show that this repeatedly refused to interfere on second appeal where of a Lower Appellate Court has given an erroneous or reason for disbelieving or setting no value upon evidenc are, however, many cases which support a different 1 Jur. N. S., 35; 8 W. R., Civ. Rul., 395; 7 B. L. 4; 23 W. R., 160; 24 W. R., 119, 192, 251, 289, 29 and 431. Without attempting to reconcile the decisi point which can be properly estimated only with ref

t of the particular cases, we may observe that there is a material 'erence between a case in which a Judge has assigned one bad reason believing or disbelieving a particular piece of evidence, while he given one or more good reasons for the same belief or disbelief, or se in which putting this particular piece of evidence wholly aside, ugh remains to support the judgment, and a case in which the ential question or one of the essential questions to be decided, ts upon the evidence believed or disbelieved, regarded as of great ue or considered worthless for a reason which is unsound and ustainable. In the case now before us, evidence such as that to ich the District Judge refers, the evidence, that is, of traders d merchants with books of accounts would no doubt be valuable r certain purposes, but it is to be observed that this evidence, if duced, would go to show the price of grain at hâts, bazars and er places of trade. The difference between the price and the e paid for the crops upon the spot where they are grown, or at e nearest market at which they are usually sold may vary very siderably. The witnesses who have been called by the plaintiff the holders of land in the neighbourhood who may not un-sonably be supposed to remember the prices at which they have d their crops from year to year either upon the lands where they re grown, or at the nearest market available to, and frequented the tenants. That such evidence is relevant in this case, and that h evidence ought to be fairly considered and weighed, we ap-hend there can be no doubt.

We think, therefore, that the case must go back in order that s evidence may be duly considered; and that upon this evidence District Judge may find whether there has been the increase of ce alleged by the plaintiff, or any other increase of price which l entitle him to enhancement of rent upon the only ground with ich this appeal is concerned. The case will be remanded to the trict Judge who will proceed to deal with it and with the ques-s raised in the cross-appeal in conformity with the directions tained in this judgment.

The costs of these appeals will be costs in the suit, and will le the final result.

[CIVIL APPELLATE JURISDICTION.]

1881. *March 30th.*

No. 2951 of 1879.

SHEIKH NOSIBULLA, (DEFENDANT)..... APPELLANT;

AND

SHEIKH NASER MISTRI, (PLAINTIFF) ..... RESPONDENT.

Bond—Covenant not to alienate—Mortgage Lien.

A by a bond covenanted "not to alienate the property of himself and his daughter for which he was about to sue, or the rest of his own property until the loan secured by the bond was paid off."

Held, that the bond did not operate as mortgage by A.

Rajkumar Ramgopal Narayan Singh v. *Ram Dutt Chowdhry* 5 B. L. R., 264 distinguished. *Gunoo Singh* v. *Latafut Hossein* I. L. R., 3 Cal., 336, (S. C.) 1 C. L. R., 91 followed.

APPEAL against the decree of the District Judge of the 24-Pergunnahs, dated the 22nd September 1879, affirming the decree of the 1st Moonsiff of Alipore, dated the 30th of December 1878.

The facts appear from the judgment of the High Court.

Baboo *Rash Behary Ghose*, for the Appellant.

Baboo *Gurudass Bonnerjee*, for the Respondent.

The judgment of the High Court (1) was as follows:—

The plaintiff in this case was a bond-creditor of one Kumaruddi Sheikh. The defendant subsequently to the date of the bond purchased certain property from Kumaruddi Sheikh. The plaintiff having obtained a money decree against Kumaruddi Sheikh instituted this suit against the defendant in order to establish a lien on what he claims to be his mortgage bond against the land purchased by the defendant. The defendant denies that the plaintiff's bond gave him any lien whatever and insists that it was a mere money bond, and that his purchase therefore is not affected by the bond. The words of the bond were these: "Kumaruddi Sheikh engages not to alienate the property of himself and his daughter for which he was about to sue, or the rest of his

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›perty, until the loan secured by the bond was paid of." The intiff insists that these words give him a charge or lien on the ole of Sheikh Kumaruddi's property as also the property which might recover in the suit referred to in the bond.

Both Courts have decided in favour of the plaintiff that under se words in the bond he had a lien on Sheikh Kumaruddi's perty and on this specific property which has been purchased by defendant.

Before the District Judge two authorities were cited, one of m *Gunoo Singh* v. *Lataful Hossein*, I. L. R., 3 Cal., 336, (S. C.) . L. R., 91 is an authority to show that general words like those d in this bond would be insufficient to give a creditor a lien upon y specific property. The other is a Full Bench case reported in 5 L. R., 264, *Rajkumar Ramgopal Narayan Singh* v. *Ram Dutt wdhry*, and is relied upon by the plaintiff to show that in this rticular case there was sufficient mention of property in the bond to ve him a lien. Now the construction that ought to be put upon cuments of this nature is stated very plainly in Sugden on Vendors and Purchasers," p. 711, 14th edition. It is there laid wn that it is a general rule although it may not hold universally e, that a covenant to convey and settle lands will not be a specific n on the lands of the covenantor, but the covenantee will be a editor by specialty. That accords with the decision of *Gunoo ngh* v. *Lataful Hossein*, I. L. R., 3 Cal., 336, (S. C.) 1 C. L. R., to which I have referred, and it also accords with common sense d reason.

Even without these authorities, we should be of opinion that e words used in this bond are too vague and uncertain to pass y lien. In fact no specific property whatever is mentioned situation. In the case of *Rajkumar Ramgopal Narayan Singh Ram Dutt Chowdhry*, 5 B. L. R., 264 referred to, property nate in certain specific mouzahs is mentioned, and therefore this e is distinguishable from the case now before us.

On the ground therefore, that the words of this bond are too gue and general to give any specific lien, we think that the ision of the Courts below should be reversed. In addition to authorities above referred to, we find it laid down in Macpherson's k on Mortgages, p. 64, that "the property intended to be

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mortgaged should be described so that it may be readily recog and identified and so as to meet the requirements of the R tration Act."

Now we find from section 21 of the Registration Act "no non-testamentary document relating to immovable pro shall be accepted for registration unless it contains a descri of such property sufficient to identify the same." We also that this particular bond was recorded under the Registratio in the book numbered "four" required to be kept by the Act, by the provisions of the Registration Act all documents relate to immovable property and which are not wills are t recorded in book "one" while in book "four" are to be en documents which do not relate to immovable property. We t therefore, that this bond having been entered in book "four," pretty plainly what the intentions of the parties themselves when this instrument was registered. If they had supposed t gave a lien upon specific immovable property, it would have their duty to have it recorded in book "one," and unless i recorded in book "one" there would be no protection for a pur buying from a bond-debtor, for no search of the indexes requi be kept by the Act would give him notice that land belonging bond-creditor had been hypothecated. Putting it at the hi the parties before us stand in precisely the same position.

Even if the plaintiff intended to obtain a lien on his de land, he would only be in the same position as the defendant a purchaser for valuable consideration. But the defendant, in this position has taken the precaution to register his conv as a conveyance of immovable property, whereas the plainti only taken under a bond in these vague and uncertain word has failed to register it properly as a document relating movable property.

We think that the decision of the Courts below mu reversed, and this appeal decreed with costs.

[SMALL CAUSE COURT REFERENCE.]

RAMSEBUK AND OTHERS ..... PLAINTIFFS;

AND

RAM LALL KOONDOO ..... DEFENDENT.

1881.
Feb. 28th.

No 1 of 1881.

Parties—Non-joinder of plaintiffs in actions of Contract—Adding plaintiffs after suit is barred against added plaintiffs—Mitakshara joint family, Suit by, in respect of joint business contract—Co-contractors, Joinder of, as plaintiffs—Civil Procedure Code, Act X of 1877, section 31—Limitation Act, XV of 1877, sections 20 and 22 —"Prescribed period."

Two of the sons of a joint Mitakshara family consisting of the father, three sons and the widow and sons of a deceased son and carrying on business in partnership, filed a suit on the 19th July 1880 upon a hatchitta, dated the 11th December 1876. No time was fixed for the payment of the money, but the last payment made and entered by the defendant on the hatchitta was dated the 30th July 1877.

On the 26th July when the case came on for hearing it was objected by the defendant that all the persons who ought to sue where not jointed as plaintiffs. Thereupon on the application of the original plaintiffs, the father and the third son, who were described as the surviving partners of the deceased son, were added as plaintiffs, but not until the suit as against them was barred by limitation.

Held, that the Court had rightly exercised its discretion in adding the 3rd and 4th plaintiff to the record although the suit was barred under section 22 of the Limitation Act as against them:

Held, also, that the claim of the original plaintiffs was likewise barred in as much as they could only enforce that claim in conjunction with the other plaintiffs whose rights were barred under section 22 of the Limitation Act.

In actions of contract it is the right of the defendant, if he takes the objection in proper time, to insist upon all persons with whom he has contracted being joined as plaintiffs; and if, after the objection has been raised, the plaintiff proceeds with the suit without taking

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proper steps to add the person or persons whose non-joinder l been objected to, and the Court finds that the objection was u founded, the suit must be dismissed.

Boydonath Bag v. *Grish Chunder Roy*, I. L. R., 3 Cal., 26 d sented from.

Held further, that the suit would have been in time if all t plaintiffs had joined in the first instance.

Per Curiam :—The words "prescribed period" in section 20 the Limitation Act mean not the period prescribed for the paym of the debt but the prescribed period of limitation.

Tariny Churn Nundy v. *Shaikh Abdar Rahoman*, 2 C. L. 316, doubted.

There is no equity but often much injustice in allowing a joint contractor out of many to sue the defendant notwithstand an objection duly made by the latter, and the Court has no ri to allow one co-contractor to recover under such circumstan though he may no doubt adjust the sum which he recovers w his co contractors.

As between the members of a joint family, any one or more m be authorised by the rest to *act* as their agent or agents in business transaction, but when a joint family or any members o carry on trade in partnership and contract with the outside pu in the course of that trade, they have no greater privileges t any other traders, if they are really partners they must be bo by the same rules for enforcing their contracts in Courts of as the members of any other partnership.

REFERENCE submitted for the opinion of the High C under section 7 of Act XXVI of 1864 by the first and third Ju of the Calcutta Small Cause Court.

The terms of the Reference were as follows :—

This suit was originally instituted against the defendant co 19th July 1880. It is based upon a hatchitta, dated the 2nd 1283, corresponding with the 11th December 1876, for recove Rs. 529-1 as principal and interest. The suit was originally i tuted by Ramsebuk and Sewruttun Chand, residing in Calc describing themselves as carrying on business under the firm Sew Churn Lall Luchmundeen. The case came on for hearing b the First Judge, on the 26th July last, when the defendant pl misjoinder of parties, though properly speaking, it ought to

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en non-joinder of parties. Accordingly, on the application of the st two plaintiffs on the record, the names of the other two plain- fs, Sew Churn Lall and Bhagawandeen, were added, with e additional description of surviving partners of Luchmundeen, s name and style of the firm Sew Churn Lall Luchmundeen ing still retained. These parties were added, subject to the jection then taken by the defendant, leave being granted to n to raise the same objection at the hearing. Sew Churn Lall the father of the other plaintiffs, one other son, Luchmundeen, ving died some four years ago. At the time the new plaintiffs re added, the suit as regards them was barred by limitation. e first Judge being of opinion that the suit in this form could not oceed, dismissed it. Against this decision an application for a w trial was filed, and admitted by us. Treating the new trial it as a fresh one, the defendant put in the following pleas :— ny plaintiffs' right to sue, limitation, and never indebted. No a was recorded on the ground of non-joinder of parties. With e defence thus recorded we have tried the suit *de novo*. So far we could understand the nature of the objection touching the intiff's right to sue, it was based on the ground of the names of two last joined plaintiffs, Sew Churn Lall and Bhagawandeen, ng added after their right to institute the suit was barred by itation, and the two other plaintiffs being legally incompetent maintain the suit, and the names of the heirs of Luchmundeen being added as plaintiffs. We are of opinion, that the persons o have been joined together as plaintiffs are *primâ facie* the per parties to maintain the suit, as they are the persons o are interested in the subject matter of the suit, and with whom tually the original contract was made by the defendant. regards Luchmundeen's heirs, his widow and sons not being de parties to the suit, we do not consider it absolutely necessary t they should be impleaded either as plaintiffs or defendants : stly, because even if the widow, under the Mitakshara law ich governs the case, had a right as well as her sons, they were mbers of a joint undivided Hindu family living in commensality ere each member acts as an agent for the others), and were y represented by the surviving partners, who, when there is a nge in the partnership, are the proper persons to sue and be

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atement.

sued in respect of all contracts made by or with the firm (Lindl on Partnership, 4th Ed., 490). Secondly, because, in the absence a statutory provision, this has been the procedure in such sui recognised by the existing practice of this Court. We have ne to consider whether the suit of the two first plaintiffs is also barre We are satisfied that the law never intended it to be so. The ve words of section 22 of Act XV of 1877 are quite against such construction. The words of the section are: "the suit shall, regards him, be deemed to have been instituted when he was made a party." This is very plain language, obviously meanin that it is not intended to affect a plaintiff who has instituted his su within time. This is the view taken by Mr. Justice MARKBY, *Boydonath Bag* v. *Grish Chunder Roy*, I. L. R., 3 Cal., 26 of t identical words in section 22 of Act IX of 1871, which have be re-enacted by section 22 of the present Limitation Act, though it true, PRINSEP, *J.* differed from him. Another point has been rais by the defendant's pleader. He argues, that as the payments we not made within the prescribed period for payment, this suit is, ev against all the plaintiffs, barred by limitation. The hatchitta which the suit was brought is for Rs. 460-8, and is dated the 11 December 1876 (2nd Pous 1283). The payments made and entere by the defendant in it were as follows :—

2nd January 1877 (19th Pous 1283).....	Rs. 50
11th April 1877 (30th Choitro 1283)	40
20th July 1877 (6th Srabun 1289)	40
Total.....	Rs. 130

The suit was instituted on the 19th July 1880, only one d within time, if the last payment on the 20th July 1877 gives rise a new period of limitation.

No time is fixed for the payment of the money, so it beco due on the date of the hatchitta, *viz.*, the 11th December 1 The argument is, that the words in section 20 of Act XV of 1 "before the expiration of the prescribed period" refer, not to prescribed period of limitation but to the period prescribed fo payment of the debt. This argument is derived from the that, in other sections of the Act, the words used are, "before

tion of the prescribed period for the suit" (section 19), or mputing the period of limitation prescribed for any suit, , or application" (section 12), or some such words; and that ingly "the prescribed period" in section 20 does not mean escribed period of limitation, but the period prescribed for ayment of the debt. In our opinion, however, they mean escribed period of limitation, although the section does not sly refer to suits. Reading section 20 together with section he Act, which is the section that prescribed the different s of limitation for different descriptions of suits, the words cribed period" in section 22 have, we think, reference to 1 4 of Schedule II of the Act. The words "prescribed " alone are obviously used for the purpose of concise- as it will be found that they are similarly used in illus- n (b) of section 4 of the Act, while there can be little about their meaning in the Illustration referred to. We may r remark that Mr. Ninian Thompson has also put a similar uction upon the same words used in section 20 of Act IX of (*vide* page 17 of his Supplement to a commentary on Act of 1859). Again, if the argument of the defendant's pleader ound one, section 20 will only apply to debts payable at date subsequently to the date on which they were contracted ot to debts payable on demand. Indeed, payments made in t of a debt to become due would not be a payment of a debt. ney is borrowed on the 18th January, and it is agreed that it e repaid on the 1st February, strictly speaking there is no l the 1st February. Then again it could not give rise to a new of limitation, for, the limitation would run, not from the payment, but from the date the debt became due, such as February. In other words, if the argument is a good one, ion is wholly infructuous. Such cannot, we think, have intention of the Legislature. We have next to decide the two plaintiffs who instituted this suit can recover against the defendant for the entire claim. We are of hat either as partners, or as members of a joint undivided ily, they have a right, at least to some portion of the d for, though what that proportion is, we cannot decide. owever, no reason why the two plaintiffs who originally

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instituted the suit should not succeed in respect of the entire claim. We are of opinion, that each member of a joint undivided Hindu family, and every partner of a partnership, is an agent for the other members or partners. A firm so constituted in the name under which a suit is originally brought and maintained, represents the whole family. A joint undivided Hindu family is a little commonwealth, in which every member works for the common good. The earnings and the acquisitions of property by each member wherever made are the earnings and acquisitions of the whole family, and their interests in all respects are identical; and if the members are individually capable of acquiring property for the use of the whole family, they can certainly sue and be sued individually. The two partners or plaintiffs, at the time they instituted the suit, were alone in Calcutta, and the two others in Lucknow. In one sense, therefore, these two partners can fairly say that they alone carried on the business in Calcutta in the name of the firm, quite irrespective of the two other partners, and in point of fact they actually did so; they, therefore, sought to recover the money in the name of the firm, which included all the partners in respect of an entire and indivisible contract. The Court has power, under section 26 of the Civil Procedure Code, extended to this Court, to give judgment for one or more of the plaintiffs who may be entitled to relief; and under section 32 of the aforesaid Code, we can also strike out the names of any plaintiff who may have been improperly joined. The hathchitta given by the defendant to the plaintiff Ramsebuk was joint and did not specify shares; the money due under it was payable collectively, and not distributively; and as the defendant has no defence on the merits, we are of opinion that in the interests of justice, there should be a judgment for the two first plaintiffs who instituted the suit for the whole amount of the claim. Both sides have asked us to refer certain questions to the High Court, and as we think that they are important, we are quite willing that they should be referred to a higher tribunal. The questions, referred, which are in nearly the same language as those given to us by the defendant's pleader, are:—

"1. Whether, upon the findings arrived at by the Court, the claim of the plaintiffs is barred, because the names of the two plaintiffs were added to the plaint after the suit as against them was barred?

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"2. Whether the Court, on the application of the first two aintiffs, had power to add the names of the third and fourth aintiffs, the defendant having objected that the suit, so far as e third and the fourth plaintiffs were concerned, was barred?

"3. Whether or not the suit is not altogether barred, having gard to the terms of section 20 of the Indian Limitation Act f 1877?

"4. Whether the first and second plaintiffs, having by their wn application made the third and fourth plaintiffs parties, can sk the Court to give them (the first and second plaintiffs) a judgent separately from the third and fourth plaintiffs?

"5. Can the Small Cause Court enter into the equitable ghts of the plaintiffs as between themselves, or is not the Small ause Court a Court of Equity for defendants only in terms of ction 25 of Act IX of 1850 by which legal claims or demands e permitted to be brought into Court with permission to the efendants to plead equitable defences?

"6. Whether the view taken by the Court of the right of the aintiffs as joint members of an undivided Hindu family, or as embers of a trading partnership *re* their debtor, is correct? Congent upon the opinion of the High Court our judgment is for e full amount sued for in favour of the two first plaintiffs alone, d the suit is dismissed as against the last two plaintiffs."

Allen, for the Plaintiffs.

Piffard, for the Defendant was not called on.

The judgment of the High Court (1) upon the Reference was follows:—

Before answering seriatim the questions referred to us, I ink it necessary to explain what I consider to be the law with gard to the non-joinder of plaintiffs in actions of contract. This planation will itself afford an answer to most of the questions ferred.

In actions of contract it is the right of the defendant, if he kes the objection in proper time, to insist upon all the persons th whom he contracted, being joined as plaintiffs; and if, after e objection has been raised, the plaintiff proceeds with the suit

(1) GARTH, *C. J.* and PONTIFEX, *J.*

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RAMSEBUK v. RAM LALL KOONDOO.

Judgment.

too many plaintiffs to sue together, or in allowing them to fr their suit either jointly or severally, or in the alternative, bec the defendant in such a case can always set up different defe against different plaintiffs and is in a position to obtain his c from all or any of them against whom he may succeed.

The Court can always dismiss a suit against one or n plaintiffs without difficulty or injustice, and without incurring of the objections which are applicable to the case of non-joinder.

Thus for instance, suppose that three persons A, B a sued D upon a contract, and D's defence was, that he made contract with A and B alone, and that as against them he h set-off. Then if all the three plaintiffs succeed in proving t case against the defendant, he would be defeated, because as ag the three he would have no right of set-off. But if, on the o hand, the defendant proved, that he made the contract with A B only, the suit would be dismissed as against C, and D would bably get his costs against him; but as regards A and B, question of set-off would be tried, and the defendant would suc or not, according as he proved that plea.

This is the reason why both by the Common Law Procedure of 1860, and the Indian Code of Civil Procedure, misjoinder of plai can never be fatal to a suit, though non-joinder of plaintiffs may

Now as I understand, the lower Court has found in this that all the four plaintiffs were partners in the concern, and the defendant contracted with all jointly; and it is difficult to how upon the facts the Judges could have come to any other clusion. The assets of the firm were the joint property of all partners; the firm was conducted with their joint monies; and business appears to have been carried on by the acting par on behalf of all the four.

If I considered that there was any room for doubt as to point, I should be disposed to send the case back to the Court to have it reconsidered; but as the original plaintiffs declin raise that question upon the defendant's objection, I think, t the case went back, it could only be at the plaintiffs' cost.

Having thus explained what I consider the law to applicable to the case,—I will proceed to answer the questions re to us seriatim.

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1. I think that the claim of the original plaintiff is barred, because they can only enforce their claim in conjunction with the other plaintiff and the other plaintiffs are barred by section 22 of the Limitation Act.

2. It was in the discretion of the Court to add the names of the third and fourth plaintiffs, and I think that under the circumstances they were right in so doing.

3. The suit in my opinion would have been in time, if all the plaintiffs had joined in the first instance. (I quite agree with the learned Judge of the Small Cause Court, that the words "prescribed period" in section 20 mean not the period prescribed for the payment of the debt, but the prescribed period of limitation.) We were referred to a case of *Tariney Churn Nundy* v. *Shaikh Abdul Rohoman*, 2 C. L. R., 346 in which a contrary view appears to have been entertained; and if it was necessary for the purpose of this case we should refer the point to a Full Bench. But having regard to our judgment upon the other point, it is not necessary.

4. For the reasons already given, I think that the first and second plaintiffs are not entitled to the judgment of the Court.

5. There is no equity, in my opinion, but often much injustice, in allowing one joint contractor out of many to sue the defendant, notwithstanding an objection duly made by the latter; and the Court has no right to allow one co-contractor to recover under such circumstances, though he may no doubt afterwards adjust the sum which he recovers with his co-contractors.

6. As between the members of the joint family, any one or more may of course be authorized by the rest to act as their agent or agents in any business transaction; but when joint family or any member of it, carries on a trade in partnership and contract with the outside public in the course of that trade, they have no greater privileges than any other traders. If they are really partners, they must be bound by the same rules of law for enforcing their contracts in Courts of law, as any other partnership.

The defendant will have the costs of this Reference.

[CIVIL APPELLATE JURISDICTION.]

1881. *April 6th.*

No. 251 of 1880.

NAHARMUL MARWARI ..... APPELLA

AND

SADUT ALI AND OTHERS, ... RESPOND

Civil Procedure Code, Act X of 1877 *section* 313—*Sale in exec Application to set aside—Saleable interest—Mortgage.*

In execution of a rent decree, dated 26th May 1879, c immoveable property was sold in execution and purchased b appellant on the 21st February 1880, no mention having bee of any incumbrances. On the 9th May 1879, a decree was ob upon a mortgage executed by the original judgment-debtor, execution of that decree the property which had already bee was attached, and, on the 11th March, again sold in execut the second decree, it being alleged that the property was cove the mortgage which was prior in date to the former decree.

The appellant thereupon applied that the sale of the 21st should be set aside under section 313 of the Civil Procedur and his purchase money directed to be returned to him.

Held, that if, as a fact, the property sold was covered mortgage, there was under the circumstances no such s interest in the judgment-debtor at the time of the sale on th February 1880 as would prevent the operation of section 31 Civil Procedure Code, in as much as under that sale the p would be unable to get the particular property purchased b and that the sale must be set aside.

APPEAL from an order passed by the Moonsiff of Howra the 26th of June 1880.

Baboo *Troilukhonath Mitter*, for the Appellant.

Baboo *Gopal Lal Mitter*, Baboo *Sham Lal Mitter*, *Chohun Chand Mitter*, Baboo *Rash Behary Ghose* and Babo *nath Dutt*, for the Respondents.

1881.

NAHARMUL MARWARI v. SADUT ALI.

Judgment.

PONTIFEX, *J.*

The facts are fully stated in the following judgment of the High Court (1) which was delivered by—

PONTIFEX, *J.*:—In this case the appellant purchased at a sale in execution of a rent decree. The decree was dated the 26th May 1879, and was made by the Small Cause Court Judge at Howrah. Under that decree three bighas of property at Salkea were attached on the 24th November 1879; the sale took place and the appellant purchased for a sum of Rupees 7,100. The proclamation contained no mention of any incumbrance affecting the property. The rent decree amounted to somewhere about Rs. 400 which was paid off out of the proceeds, and, as we are informed, the balance still remains in Court being the sum of Rs. 6,700 or thereabouts. The judgment-debtor had mortgaged certain property, but it is doubtful on the materials before us whether these three bighas were included in the mortgage deed or not. A plaint was filed by the mortgagee in the Court of the Subordinate Judge of Hooghly in the month of August 1879, prior to the attachment under the rent decree, and on the 9th of October 1879 a decree was granted directing that the mortgage debt should be realized by the sale of the mortgaged property or by payment by the judgment-debtor. The date of attachment under that decree does not appear, but a sale took place under that decree on the 11th March 1880, being subsequent to the sale under which the appellant purchased.

Under these circumstances the appellant applied to the Moonsiff at Howrah to set aside the sale which had been made on the 21st February 1880, and asked that his purchase money should be returned to him. The Moonsiff has dealt with the case as if it was governed by the strictest possible construction of section 313 of the Code, and he has held that as the appellant has failed to show that at the time of his purchase on the 21st February 1880, there was not any saleable interest whatever in the judgment-debtor which could pass to the appellant, therefore the Court had no power to interfere with or set aside the sale of the 21st of February 1880.

Now that would depend upon whether these 3 bighas were included in the mortgage and were affected by the decree made on the 7th October 1879, by the Subordinate Judge of Hooghly. If these three bighas of land were included in the mortgage and the

(1) PONTIFEX and FIELD, *JJ.*

1881.

NAHARMUL MARWARI v. SADUT ALI.

Judgment.

PONTIFEX, J.

decree was a mortgage decree directing a sale of the mortgage property, then it is clear that on the 7th October 1879, when the decree was made, being previous to the attachment under the rent decree the mortgagor would no longer have a saleable interest in this property, *in specie*, because the mortgage decree binding the land, the sale of the 21st February 1880 by the Howrah Court would not carry the property itself, but could only carry a right to the surplus proceeds of sale under the mortgage decree. It was never intended by section 313 that a Court should be made the instrument of injustice. In a case like this while any part of the purchase money remains in the Court, it has inherent power to deal with such money. It would be manifestly unfair that the Rs. 6,700, the balance of the money realised by the sale under the rent decree, should be paid to the judgment-debtor while at the same time the appellant was deprived of the property he believed he was purchasing, the difficulty having been occasioned by the neglect of the judgment-debtor to declare the incumbrances to which his property was subject.

In as much as we have no materials before us to shew whether those three bighas were included in the mortgage deed, we think it necessary to send the case back to the Moonsiff to inquire whether the three bighas were included in the mortgage deed. If they are included, then the order of the Moonsiff must be set aside because under these circumstances we think that there would not be such a saleable interest in the judgment-debtor at the time when the appellant purchased on the 21st February 1880, as would prevent the operation of section 313, for under that sale the appellant would then be unable to get this particular property. If, however, the three bighas are not included in the mortgage deed, then we are of opinion, upon the authority of the case of *Chutka Pa* v. *Goburdhone Dass*, 6 C. L. R., 85, that the sale to the appellant being earlier, though even under a later attachment, would give an interest to him notwithstanding that the other sale may have been under a prior attachment; and therefore he would be entitled to the property as against the subsequent purchaser, in which case the order of the Moonsiff would be satisfactorily correct, although the reasons on which he has founded the order would not be applicable.

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NAHARMUL MARWARI v. SADUT ALI.

Judgment.

PONTIFEX, J.

We send the case back to inquire whether the three bighas hich the plaintiff purported to purchase were included in the ıortgage and bound by the mortgage decree or not.

We desire to add that this order is applicable only to so much f any) of the money realised by the sale of the 21st February 380 as still remains in Court. This order will not affect the ıcree-holder in the rent suit if he has received the amount of his ıcree.

Baboo Rash Behary's client, the decree-holder, will get the sts of this appeal.

[CRIMINAL JURISDICTION.]

1881.
April 21st.

No. 188 of 1881.

)LAP DHANOOK .... APPELLANT;

AND

IPRESS ..... RESPONDENT.

riminal Procedure Code, Act X of 1877, *section* 237—*Guilty, Plea of—Plea of guilty to be recorded.*

Where a prisoner on the charge being read and explained to him pleads guilty, the Judge must record the plea under section 237 of the Criminal Procedure Code, and not merely record a narrative of what occurred and of the statements made by the prisoner. An admission which does not admit all the elements of the charge is not a plea of guilty to the charge.

PPEAL from a conviction and sentence passed by the Officiating ssions Judge of Bhaugulpore.

The facts appear from the judgment of the High Court (1) hich was as follows :—

(1) MORRIS and TOTTENHAM, *JJ.*

1881.

GOPAL DHANOOK v. EMPRESS.

Judgment.

The conviction is bad in law and must be set aside. The Sessions Judge states that the prisoner pleads guilty to the charge; and that the only question is as to what punishment should be allotted. We find in the proceedings no record of the prisoner's plea, as required by section 237 of the Criminal Procedure Code when a prisoner pleads guilty. All that we find is a narrative by the Judge of what occurred and of the statements made by the prisoner. We do not find from this that the charge was explained as well as read to the prisoner. *Vide* section 237. And we do find that he did not admit one very important element in an offence under section 211 Penal Code, *viz.*, the intention to injure another. The prisoner is said to have represented that he made the false complaint unthinkingly. This certainly does not amount to a plea of guilty.

The Judge was further somewhat inconsistent, for after stating that the prisoner pleaded guilty, he proceeds to show that he was not guilty of the charge as framed, in as much as he had not made a complaint of an offence under section 304 of the Penal Code which was alleged in the charge.

The Judge committed an error, therefore, in convicting the prisoner without a trial. We, therefore, set aside the conviction and sentence and direct that the prisoner be tried according to law and that the Judge conform to the Procedure laid down in Chap. XII of the Criminal Procedure Code.

[CIVIL APPELLATE JURISDICTION.]

1881.
Feb. 19*th.*

No. 127 of 1879.

KHMOY CHUNDER DAS AND ANOTHER (DEFENDANTS) ..... APPELLANTS;

AND

NOHURI DASIA, (PLAINTIFF) ..... RESPONDENT.

Hindu Law—Will, Construction—Void Gifts—Perpetuities—Income, Gift of—Corpus, Gift of—Alienation, Restraint upon—Accumulation.

A Hindu testator, who died leaving a son by his second wife, four minor sons by his third wife who survived him, by his will dated the 17th Bysack 1260 directed, (1) that the *corpus* of his estate, *viz.*, his houses, zemindaries, talooks and capital employed in his business should remain intact and not liable to alienation or partition, and that his heirs, sons' sons and great-grandsons and so on in succession should enjoy the profits thereof; (2), that the movables might be partitioned if his eldest son by his second wife, and his widow should not live amicably together; (3), that the testator's sons, grandsons, great-grandsons and so on should enjoy the profits of the estate subject, however, to the following other directions in the will, *viz.*, that *(a)* the eldest son should act as manager and shebait without power of alienation and without power to withdraw the capital of the business—and that on his death the eldest male heir for the time being should succeed to the managership and shebaitship; *(b)* after paying Government revenue, collection charges and repairs, profits should be divided into two portions, one of six and the other of ten annas; (*c*) that the six annas portion, which was hereby declared to be sufficient for the purpose, should be devoted to worship of the idols and the maintenance of the family; and if the members of the family should not live together during the minority of the minor sons of the widow, she should receive Rs. 12 per mensem for the maintenance of herself and family and on attaining majority each son should get the share to which he might be entitled under the will; (*e*) that after defraying the expenses of worship the six annas' portion should be divided equally among the sons, and (*f*) that the ten annas

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portion of the profits should be accumulated so long as the widow lived in harmony with the eldest son of the testator, but that if she did not so live, that portion should be divided as follows, *viz.*, $\frac{1}{4}$ to the eldest son of the testator, and the remaining $\frac{11}{16}$ to the minor sons of the widow in equal shares absolutely, the shares of the minor sons to be accumulated until they attained majority;

(4). That the dwelling-houses and gardens should go to the sons in equal shares without power of alienation, and (5) that the share of an heir (son) dying without male issue should go to the sons (male heirs) existing at the time of his death.

The widow of one of the sons of the testator's widow brought suit to have it declared that the will was void and to obtain possession of her deceased husband's share of the testator's estate as upon an intestacy.

Held, that the attempted gift of the income of the six anna portion of the profits was not a good gift of the *corpus*, there being a clear intention in the will that the gift should be restricted so that there should be no gift of the real estate; that there was an intestacy as to the six-anna and ten-anna portions of the profits, but that as to the dwelling-houses and gardens, there was a valid disposition, save as to the restraint imposed as to alienation and partition, in favour of all the sons in equal shares.

Held, further, as to the movables, that although there was no express gift in the will, an intention on the part of the testator to give the movables to his sons in the shares specified in the attempted gift of the ten-anna share of the profits, might be gathered from the will.

Sonatun Bysack v. *S. N. Juggut Soondree Dossee*, 8 Moo. I. A., 66 distinguished; *Chundermoni Dassi* v. *Moti Lall Mullick*, 5 C. L. R., 496 and *Aushootosh Dutt* v. *Doorga Churn Chatterji*, 5 C. L. R., 296 (S. C.), L. R., 6 I. A., 182 commented on.

Principles applicable to the construction of wills discussed.

APPEAL from a decree passed by the Subordinate Judge of Dacca on the 24th September 1878.

In this case the plaintiff sued to recover a share of certain property left by one Kishto Prosaud Bose who died in 1260, as upon an intestacy, it being alleged that the will of the deceased was void according to the provisions of Hindu law.

The whole case turned upon the construction of the will in question. The material portions of the will are set out *in extenso* in the judgment of the High Court.

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Judgment.

Evans, Baboo *Durga Mohun Dass*, Baboo *Rashbehary Ghose*, Baboo *Akhil Chunder Sen* and Baboo *Lall Mohun Dass*, for the Appellants.

Branson, Baboo *Hurry Mohun Chuckerbutty* and Baboo *Opendronath Mitter*, for the Respondent.

The judgment of the High Court (1) which was as follows was delivered by—

FIELD, *J.*

FIELD, *J.*:—The most important questions to be decided in this case are concerned with the construction to be put upon the will, dated 17th Bysack 1260 (corresponding with the 28th April 1853) made by the late Kishto Prosaud Doss.

It may be well to observe that this will was made before the passing of the Hindu Wills Act of 1870, and that therefore the provisions of this Act and the provisions of the Succession Act incorporated therein by reference have no direct application to the will with which we have to deal in the present case.

The testator Kishto Prosaud Doss was thrice married as he states in the 4th paragraph of the will. By his first wife, he had no male offspring. By his second wife he had a son, Sukhmoy Chunder Das, defendant No. 1. By his third wife, Sreemutty Priyassi, he had three sons born before the date of the will, *viz.*, Hari Charan Dass, Gour Hari Dass and Anund Hari Dass, and his wife was on that date pregnant, and according to the finding of the Subordinate Judge, was subsequently delivered of a posthumous son who was born alive and died a short time after his birth. It may here be observed that although an objection has been taken to the finding of the Subordinate Judge on this point, such objection has not been argued or pressed before us by the learned counsel who represented the respondents.

Hari Charan died after the testator's death and before the institution of the present suit. Gour Hari Dass is defendant No. 3 and the plaintiff is the widow of Anund Hari Dass the third son by the third wife.

The will, after setting forth the family relations of the testator, and the manner in which he had acquired his property, contains the following paragraphs which we have had carefully translated,

(1) McDONELL and FIELD, *JJ.*

1861.

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the translation to be found at page 84 and following pages of the Paper Book being admittedly incorrect in many essential particulars.

Para. 6. My estate shall remain intact and from the profits thereof there shall be performed the worship, the periodical festivals and the ceremonies of my ancestral deities, idols and *chakras* according to my turn as they have hitherto been performed. As regards the enjoyment of the profits I do hereby provide that my houses, zemindaries, talooks and other immovable properties, and my business of various descriptions, and the capital stock thereof shall always remain intact as at present, and my heirs, sons' sons and great-grandsons, and so on in succession, shall be entitled to enjoy the profits thereof. No one shall be competent to alienate by sale or gift the immovable property, to close any business to misappropriate the capital stock thereof or to divide the same. If any one succeeds in doing so or will do so, it shall be disallowed by the authorities.

Para. 7. After my death my eldest son Sreeman Sukhmoy Chandra Das shall as provided by this will act as *kurta* (manager) for the preservation and management of my entire estate: as *shevait* to the deities, idols and *chakras* in my turn; and shall as *kurta* manage and perform the affairs and duties, as they are now performed by me from the profits of my estates, commercial transactions, mercantile and banking business, zemindaries and talooks, and the rents and profits of my houses, and as such *karmadhakhoya* (manager of business,) he shall prepare accounts as they are now prepared in my time, year after year shall keep one set with himself, and shall make over another set to the mother and guardian of the minors. But he shall always be devoid of power to alienate my immovable properties, which are now in existence, by sale, gift or otherwise, or to misappropriate or waste the capital stock of my business. If he do so, such act shall be null and void; and the person who acts in contravention (of the provisions) shall be deprived of his rights and interest (under this will).

Para. 8. Whichever of my sons shall after my death act as *Samarakshak* (protector) and *Karmadhakhoya* (business manager) of the estate for the time being, according to the terms of this will shall duly and at the proper times pay the Government Revenue from the profits of the landed properties belonging to the estate

d shall thus protect the estate. If any immovable property shall lost through the negligence of the manager and otherwise than r divine visitation and the circumstances over which there is no ntrol, the liability to make good such loss shall rest with the anager. After discharging the public revenue, the collection arges, and the cost of repairs of the houses from the profits of the movable properties and of the trading business, six-sixteenths (six nas) of the entire surplus balance shall be applied year after year part towards the performance of the worship and periodical fes-vals of my ancestral deities, idols and chakras in the proper me; and the residue thereof towards the maintenance of all e members of the family and the performance of religious rites d ceremonies; and the remaining ten sixteenths (ten annas) shall carried to the credit of my estate. If disagreement and discord ntually take place between him (the said Sukhmoy Chandra) and e mother of the minors, and they want to live in separate mess, en the said six-sixteenths (six-anna share) being regarded as a hole (or sixteen-sixteenths) my eldest son Sreeman Sukhmoy handra Dass, in consideration of his having in my lifetime in-eased the wealth by his labour and exertions in managing the ading business shall receive five-sixteenths of such whole (or xteen-sixteenths, *i. e.*, $\frac{5}{16}$ of $\frac{10}{16}$) in the following case, that to say if a son is born to my last married wife of her present nception; and the sons of my last married wife shall receive the maining eleven-sixteenths (or eleven annas) in equal shares. If e issue of the present conception of my last married wife is not male child, or if being a male child he dies unmarried then my lest son Sukhmoy Chandra Dass, shall for the reasons above ntioned receive five and a half-sixteenths (or annas) and the other s ten and a half-sixteenths (or annas) in equal shares and they in ir respective rights shall be competent to enjoy and make gift such profits.

Para. 9. As long as my last married wife and the sons born her womb, and my eldest son, the said Sukhmoy Chandra Dass ll live in concord with one another, the expenses of the *delsheva* and of the maintenance and daily and periodical rites and emonies of all the members of the family shall be defrayed m the six-anna share of the profits aforesaid. If, however,

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after all they disagree and fall out with each other and separ in mess, then the sums of money that may fall to the spective shares of the different sons under the terms of the w shall be placed to their respective credits in the accounts of ev year. Any of the shares shall upon attainment of majority, competent to take and receive upon his receipt from the mana the money placed at his credit whenever he may wish to do If the manager fraudulently refuses to pay the same he and right to receive the profits shall be liable to make good the shar claim with interest on the amount in deposit to his credit (a interest to run) from the date of demand, and the manager s have no right of objection thereto.

Para. 10. The several objects to which the six-anna sh has been appropriated are likely to be effectuated in the s manner (as before) so long as concord and harmony exist. however, my last married wife or her sons do not agree with Su moy Chandra Dass or his wife and son; and if there arise (in c sequence) a necessity for separation, they shall be at liberty separate, and with the exception of the landed properties and c tal stock of the trading business now belonging to my estate the articles used by the idols to divide and take, to appropriate to convey by gift, sale or otherwise the other movable prope subject to the conditions, provisions and shares laid down in eighth paragraph preceding for the division of the ten-anna s of the profits. Out of six-anna share set aside for the expen *debsheva &c.* my last married wife shall during the minori her sons receive from the manager rupees twelve per month f maintenance of herself and the minors; and the balance remain in the hands of the manager who shall meet from it t penses of the yearly periodical and daily rites and ceremonies. one of my sons by my last married wife who attains majority from the date of his so attaining majority cease to receive maintenance his proportionate share of the said twelve rupe shall be entitled to his proper share (under this will), a enjoy and appropriate the same, and the surplus balance of six-anna share which remains after defraying the worship, t and periodical and daily festivals and ceremonies, shall be by my sons born of my two wives in equal shares, wi difference in their proportionate shares.

Para. 11. All my sons shall rside in and occupy my ances- al dwelling and the dwelling-house and gardens constructed and id out by myself. No one of them shall be competent to demo- sh the same or alienate them by sale or gift. All my sons will e entitled to hold and enjoy the same in equal shares.

Para. 12. If any one of my heirs dies without male issue his idow shall receive maintenance only, and his grandson by a aughter (if any) shall get nothing. The profits of his share shall e received in equal shares by the surviving sons. She shall remain the family dwelling-house as long as she lives and on her death, e surviving sons shall receive the same in equal shares for their sidence.

Para. 15. After the death of Sreeman Sukhmoy Chandra ass by the will of God my eldest surviving heir for the time ing shall discharge and perform all the duties aforesaid as pro- ctor and manager of the entire estate as *kurta* and *shevait* accord- g to the provisions of the seventh paragraph. And this direc- on shall hold good in respect of the sons, grandsons, and other eirs in succession.

The plaintiff, as the widow of Anund Hari Dass has brought is suit to recover the share of the property, to which she as nund's widow would be entitled if Kishto Prosaud Dass, had died testate, and her main contention is that the provisions of the ill are void; and that effect cannot be given to them so as to prive her of the share to which she is entitled in the family roperty.

The Subordinate Judge has given her a decree which is to be und at page 166 of the Paper Book. Substantially he comes to e conclusion that the testator has made no devise or bequest of the *rpus* of his property, that he has attempted to create an estate hich is invalid under the Hindu Law; that therefore the general ention of the will fails; and the property must descend according Hindu Law in the same manner as it would descend if Kishto rosaud had died intestate.

In order to deal with the questions which have been argued fore us, it will be useful to summarize the provisions and limita- ns contained in the will. They are (1). The *corpus* of the ate, that is, the houses, zemindary, talooks and capital employed

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SUKHMOY CHUNDER DAS v. MONOHURI DASIA.

Judgment.

FIELD, J.

in the business, is to remain intact. There is to be no alienati and no partition. This direction is repeated more than once in t will. (2). The movables may be partitioned and alienated Sukhmoy and the widow cannot live together amicably. (There is a general direction that the testators, sons, grandso great-grandsons, and so on are to enjoy the profits of the est but this general direction is controlled by the directions wh follow as to the mode of enjoyment. (4). The eldest son Sukhm Chunder Dass is to act as manager and *shevait* without power alienation and without power to withdraw the capital invested business. He is to keep regular accounts. On Sukhmoy's dea the eldest male heir for the time being is to succeed to the positi of manager and *shevait*.

(5). In respect of the manner in which the profits are to dealt with, the Government revenue, collection charges and co of repairs of houses are to be first defrayed therefrom; after wh the profits are to be divided into two portions, a six-anna port and a ten-anna portion.

(6). The six-anna portion is to be devoted to the worship the idols and the maintenance of the family. The testator pressly declares that this portion will be sufficient for these obje (see para. 10). If the members cannot manage to live toget in harmony during the minority of Sreemutty Pria Dassi's childr she is to receive out of this six-anna portion twelve rupees mensem for the support of herself and her children. Each son, a attaining majority, is to get his share under the other provisi of the will, and his maintenance is no longer to be defrayed fr the monthly allowance of twelve rupees. The balance of the s anna share after defraying the expenses of worship is to be divi equally between all the sons. It may be observed here that th is no express provision as to the accumulation of this balance dur the minority of the children.

(7). The ten-anna portion of the profits is to be credite the estate, or in other words to be accumulated so long as Sukh and Pria Dassi live in harmony.

(8). If Sukhmoy and Sreemutty Pria Dassi cannot live gether in harmony, then the ten-anna share of the profits is t divided, Sukhmoy getting five-sixteenths if a fourth son be

f Pria Dassi, which event, the Subordinate Judge finds to have ken place. The sons of Sreemutty Pria Dassi are to receive the mainder of the ten-anna portion of the profits in equal shares. In e case of the minors, their shares were to be accumulated till ajority and then paid to them on demand. An absolute power of sposal is given to the sons over the profits so divided amongst em.

(9). The dwelling-houses, ancestral and constructed by the tator, and his gardens are given to all the sons in equal shares thout power of alienation.

(10). The share of an heir (son) dying without male issue is go to the sons (male heirs) existing at the time of his death.

In construing the provisions of this will we must follow the usual le, that is, endeavour to collect the testator's intention from the guage used by him, and then consider whether such intention is thin the testator's power, limited as it must be by the general licy of the law,—*Sonatun Bysack* v. *S. M. Juggutsoondree Dossee*, Moore's I. A., 80. In order to discover that intention, we must o follow the rule laid down by their Lordships of the Privy Council the Tagore case, where they say that "the true mode of constru- a will is to consider it as expressing in all its parts, whether nsistent with law or not, the intention of the testator and to termine upon a reading of the whole will whether assuming the nitations therein mentioned to take effect, an interest claimed der it was intended under the circumstances to be conferred,— *ndro Mohan Tagore* v. *Ganendro Mohan Tagore*, 9 B. L. R., 409. will be convenient to consider the intention of the testator *first*, to the six-anna share of the profits; *secondly*, as to the ten-anna are of the profits; *thirdly*, as to the dwelling-houses and gardens; d *fourthly*, as to the movable peoperty.

First, then with regard to the six-anna share of the profits, the tator directs in the 8th paragraph of the will that such share ll be applied to defray the cost of worship of the idols and expenses of the maintenance and clothing and ceremonies of entire family. It has been contended on the authority of the e of *Chundermoney Dassi* v. *Moti Lall Mullick*, 5 Cal. L. 496, that this disposition of the six-anna share of the fits is wholly void. In that case the testator directed that

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certain lands should be held by his executors on trust to app rents and profits *first* in the celebration of certain poojas performing the worship of the family idols and other r festivals, and *secondly*, for the maintenance of the five young their wives, sons and male descendants, and female desc till marriage. It was held that the real object of the testat to establish a permanent endowment to the testator's desce and that the perpetual trusts for this purpose were voi think that the argument founded on this case will prob sufficiently answered by the case of *Aushootosh Dutt* v. *Chuni Chatterjee*, L. R., 6 I. A., 182: (S. C.,) 5 Cal. L. I where in a somewhat similar case to the present it was held direction that the surplus, after meeting the cost of religi and ceremonies, should be devoted to the support of the amounted to a good bequest of the surplus to the members joint family for their own use and benefit. It appears to us, h that the present case is not so exactly similar to either of t just quoted, that it can be decided upon the authority o of them. In the present case there is no gift of the *corpus* real estate. The intention of the testator clearly was t *corpus* was never to be alienated or partitioned; and in carry out this intention he has directed the managemen property to be vested in his eldest son him surviving, and a in the eldest male descendant for the time being; that perpetual series of managers or trustees. Mr. Evans has co that the gift of the six-anna share of the profits is a good the *corpus* according to the cases to be found in Theobald o p. 213. See also section 159 of the Indian Succession A 1865.

In the case of *Maddox* v. *Greener*, L. R., 14 Sir R. Malins, Vice-Chancellor said that there was no di between giving the income of the land and the rent and the land, and that a gift of the income of land un is simply a gift of the fee simple of the land. Can it be in the present case there is an unrestricted gift of th share of the profits? Can it be held that a gift of t was intended to be a gift of the real estate itself, when tion of the testator to be gathered from the whole will cl

there should be no gift of the real estate, that the real estate should remain unalienable and unpartitioned in the hands of a perpetual series of managers? It appears to us that there can be only one answer to this question, and that the answer must be in the negative.

It is settled law that a private person cannot by gift or will create a new estate or make property inheritable otherwise than the law directs. See *Jotindro Mohan Tagore* v. *Ganendro Mohan Tagore*, 9 B. L. R., 394, 402; *Kumar Asima Krishna Deb* v. *Kumara Krishna Deb*, 2 B. L. R. (O. C.), 25, 26, 27; and 8 Moore's I. A., 66. If then there be a good gift of an estate and there be also a prohibition against alienation or partition, the gift will be good and the prohibition will be void. See 9 B. L. R., 404; *Krishnaramani Dasi* v. *Ananda Krishna Bose*, 4 B. L. R. (O. C.,) 265, Note; and 2 B. L. R. (O. C.), 29. When there is a good gift with an invalid restriction the gift will be good the restriction void. Where there is a general intention to create a valid estate and a particular intention to deprive such estate of its legal incidents effect will be given to the general intention, and the particular intention will be disregarded. Is it possible to say that in the present case we can gather from the will a general intention on the part of the testator to create a valid estate in the real property in favor of any person or persons who could take such estate according to the Hindu law?

It appears to us that it is impossible to gather any such intention from the will. The general intention which is obtainable from the whole instrument is clearly not an intention to create a valid estate in the *corpus* in favor of any individual but to tie up such *corpus*, and to give the profits only to the male descendants of the testator, or in other words to create, in the profits merely a sort of estate in tail male. It is clear that to this general intention effect cannot be given according to the principles laid down in the decided cases. We think, therefore, that the principle of *Mannox* v. *Greener* cannot be applied to the present case.

There are other considerations upon which it appears to us that the bequest of the six-anna share of the profits must fail. The testator directs that the surplus of this six-anna share after defraying the expenses of worship is to be divided equally between the sons of both his wives. In another part of the will he directs that the minor sons are to get their shares only on obtaining majority.

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FIELD, J.

As to what is to be done with the minors' share of the profits in the meantime there is no clear direction. As to what is to be done with this six-anna share of the profits after the death of the sons there is no express direction, no direction at all, unless we can come to the conclusion that the general provisions of paragraphs 6, 8 and 12 apply.

As to paragraph 12 it has been contended by Mr. Evans that this paragraph contemplates the failure of sons of the testator's sons, and not an indefinite failure of male issue; and he relies upon the case of *Sreemutty Soorjeemoni Dossee* v. *Denobundhoo Mullick*, 9 Moore's I. A., 123. In all probability it would be proper to put the construction so contended for upon this paragraph of the will in as much as, although the testator uses the word "heirs" in the first sentence, he directs that the share of the profits of his deceased heir shall be divided equally among his "sons," not "heirs," who will be then alive. But it is not in our view material to decide this question, in as much as according to the construction which we think must be put upon the whole will, the general intention of the testator fails. The general direction contained in paragraph 6 is clearly intended to create an estate in tail male. Such an estate would we think be void at Hindoo law. In the case of *Sonatun Bysack* v. *Juggut Soondree Dassi*, 8 Moore's I. A., 66, SIR BARNES PEACOCK who delivered the judgment of the Supreme Court said: "We cannot see that the testator had made any distinction between his grandsons, his great-grandsons or the remoter descendants comprised in the term "*etcetera* heirs." All are to inherit their ancestor's share according to the Shasters, or Hindoo law, modified only by the exclusion of the females or the descendants of females, therefore the object which he has in view is to create for his own property as long as he has any descendants in the strict male line, a new course of descent. That object is we think beyond the scope of the testamentary power recognized by law and must therefore fail. Their Lordships of the Privy Council did not expressly overrule this dictum and in the view which they took of the case, it was unnecessary to find specially upon this point; but the Tagore case is an authority that the creation by a Hindu of an estate of inheritance in tail male is void. It has been argued that the present case is similar to and ought

be governed by that of *Sonatun Bysack* v. *Sreemutty Juggut Soondree Dossee*, but it appears to us that there is one essential difference between the two cases. In that case there was an express grant of the *corpus* to the idol; and the Privy Council held that the effect of this was to grant the property effectually for the benefit of the sons. In the present case not only is there no express grant of the *corpus* but, as has been already pointed out, the presumption of such a grant is opposed to the general intention of the testator to be gathered from the whole of the provisions of the will.

Upon the best consideration that we have been able to give to the matter, it appears to us that the deposition of the six-anna share of the profits is void. And that as regards such share the testator must be deemed to have died intestate.

Then as regards the ten-anna share of the profits the case is still stronger. Two events appear to be here contemplated; *first*, the event of the family continuing joint, and *second*, the event of the family becoming divided. In the former case the ten-anna share of the profits is to be credited to the estate, in other words, is to be accumulated and apparently for ever. It is scarcely necessary to say that any such direction for accumulation without a disposition of the beneficial interest is void. See 2 B. L. R., (O. C.), 41; 4 B. L. R., (O. C.), 277.

Then in the second event that is in the case of the eldest son and the third wife and her sons not being able to agree, the profits are to be divided in the shares directed in the eighth paragraph of the will. There is no grant of the *corpus*, no disposition of the beneficial interest, and the remarks already made with reference to the six-anna share of the profits apply here with still greater force. In any case it will be observed that the disposition of the ten-anna share of the profits is made to depend not upon the will of the testator but on the subsequent acts of the legatees. It appears to us that as regards the ten-anna share of the profits of the real estate also, the testator must be taken to have died intestate.

Thirdly. As to the dwelling houses and gardens we think the eleventh paragraph of the will contains a valid disposition. The general intention of the testator here, was to give this portion of the property in equal shares to all his sons and to this general intention effect must be given. We have also a particular intention

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prohibiting transfer by sale or gift. This particular intention opposed to the policy of the law and must, therefore, be disregarde The result is that so far as these portions of the property are co cerned, the will does not interfere with the plaintiff's rights Hindu law. *Fourthly*, with respect to the movable there is express gift in the will, but there is a direction in the will, in t tenth paragraph, that in the event of separation, the movable pr perty shall be partitioned according to the share mentioned in pa graph 8, as applicable to the ten-anna share of the profi We think that although there is no gift of the movables so many words, we may reasonably gather from these provisi an intention on the part of the testator to give the movables his sons in the shares above specified; and that this case co within one of the general rules of construction, namely, that eff should be given to a general prevailing intention, however imp fectly and obscurely indicated, if discoverable by a fair and lib construction of the language of the will, and if allowed by law.

The result will be that the decree of the Subordinate Ju will be modified in respect of the movables only, and as to the of the property will be confirmed.

It remains to deal with the question of accounts, and it appe to us that we ought not to interfere with the directions given this respect by the Court of first instance. The will itself dir the managing member to keep accounts, and if these directions h been followed, there ought to be no difficulty in accounting for profits since the death of the testator.

It may be well to observe that as to the *factum* of the will, entertain no doubt that the will was duly executed by the testa Some arguments were addressed to us to inform the genuine of the will, but we think that there can be no reasonable doubt to the will having been executed by the testator, regard being to the direct testimony, and to the internal evidence supplied by instrument itself.

[CIVIL APPELLATE JURISDICTION.]

GOURI PROSAD MOITRA, (JUDGMENT-DEBTOR) APPELLANT;

AND

BHOLANATH SANYAL, (DECREE-HOLDER) ..... RESPONDENT.

1881. *March* 30*th*.

No. 320 of 1880.

Civil Procedure Code, Act X of 1877, *section* 260—*Attachment—Disobedience to order of Court.*

By a decree relating to certain joint property belonging to the plaintiff and defendant, but which had previously been held in the sole name of the defendant, it was directed that the plaintiff and defendant should jointly manage the property, and that the names of both should appear in all papers connected with such property. The plaintiff subsequently applied to have his name registered in the Collectorate, but was opposed by the defendant, who, it appeared, also allowed the amlahs of the estate to continue to use his sole name.

Held, that the Court had under the circumstances jurisdiction under section 260 of the Civil Procedure Code to attach the defendant's property until he had obeyed the decree by having the joint names of himself and the plaintiff inserted in all documents belonging to the estate.

APPEAL from an order passed by the First Subordinate Judge of the 24-Pergunnahs on the 11th September 1880.

Under a decree dated the 16th November 1877 it was directed that instead of the sole name of the defendant Gouri Prosad being used as previously in all papers of the estate, the subject matter of the suit, the names of the plaintiff Bholanath Sanyal and of the defendant Gouri Prosad should be used jointly. The direction in the decree was as follows: "that the plaintiff and defendant jointly manage the property and that the names of both do appear in all papers connected with such property as proprietors."

Some time after the decree had been passed the plaintiff applied for registration of his name in the Collectorate in respect of certain revenue-paying lands belonging to the estate. The application was opposed by the defendant Gouri Prosad, but was

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Judgment.

ultimately granted. On similar applications being made by th plaintiff, the defendant entered opposition. It also appeared tha the amlahs were allowed by him to continue to use his sole name.

The Subordinate Judge thereupon on the 11th September 188 passed the order which is now appealed against, directing th attachment under section 260 of the Code of Civil Procedure o the defendant's property and issued notices on the amlahs and th tenants informing them that in future the joint names of th plaintiff and defendant should be used in all papers and documen relating to the joint estate (such as pottahs, kabuliuts, rent receip Collector's papers, hookumnamahs, &c.).

On appeal it was contended that the defendant was not direc ed by the decree to perform any particular act within the meanin of section 260 of the Civil Procedure Code; and that the plaint was entitled by the decree to use his name as directed, withou action on the part of the defendant.

Baboo *Tarucknath Sen*, for the Appellant.

Baboo *Saroda Churn Mitter*, for the Respondent.

The judgment of the High Court (1) was as follows:—

We think that the Subordinate Judge had jurisdiction make the order under section 260. Whenever the petitioner she that he has obeyed the decree by having the joint names of t parties inserted in all the books and papers, then the attachme under section 260 will come to an end, and on the other han if the respondent has not done all that he ought to do under t decree, the petitioner can move the Subordinate Court against hi The appeal is dismissed with costs.

(1) PONTIFEX and FIELD, *JJ.*

[CIVIL APPELLATE JURISDICTION.]

1881.
April 21*st*.

No. 794 of 1879.

UMESH CHUNDER GHOSE, (PLAINTIFF)..... APPELLANT;

AND

SHAMA SUNDARI BYE, (ONE OF THE DEFENDANTS) RESPONDENT.

Evidence Act, I of 1872, *section* 65—*Secondary Evidence—Assignee of bond in possession of one who does not produce it—Loss or Non-production by obligee of Bond assigned to third person.*

The plaintiff having on the 28th December 1877 in execution, under Act VIII of 1859, of a decree against R, purchased a debt due to R upon a registered bond, dated the 28th March 1873, filed a suit against the obligor, on the 12th March 1878 to recover the amount of principal and interest secured by the bond and made R a defendant and served him with a summons to produce the bond.

No appearance in the suit was entered by R and on his not producing the bond criminal proceedings were instituted against him.

The other defendant denied having executed the bond or having borrowed the money alleged to have been secured by it.

A copy of the bond from the Registrar's office was tendered and received as secondary evidence, as well as the Mookhtarnamah under authority of which it was registered, but no evidence of the loss or destruction of the original bond was given. The lower Courts found that the bond had been executed by the defendant and registered under a power executed by her, and that the money was paid to her father and applied to the payment of Government Revenue due in respect of her estates.

On appeal it was objected that a sufficient foundation had not been made for the admission of secondary evidence.

Held (by PONTIFEX and MORRIS, *JJ.*, PRINSEP, *J. dissentiente*) that the plaintiff could not stand in a higher position than the obligee of the bond, and that as before R could have given secondary evidence of the land it would have been necessary for him to prove its destruction or loss, the copy from the Registrar's office had been improperly admitted.

Per PONTIFEX, *J.*:—Making R a defendant and giving him notice to produce would not entitle the plaintiff to use the copy from the Registrar's office as secondary evidence of the bond.

Per PRINSEP, *J.*:—That with the findings of fact by the Lower Courts, and payment not pleaded by the obligor, plaintiff was entitled to a decree.

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Statement.

APPEAL from a decree passed by the District Judge o shahye, dated the 5th February 1879, reversing a decree Subordinate Judge of that district, dated the 12th Sep 1878.

The plaintiff in this case on the 28th December 187 chased the right, title and interest of one Ramjoy Sircar in dated Choit 1279, to secure Rs. 1000 with interest at Rs cent. per mensem payable in the following Joysto.

He did not get possession of the bond and there was n to show what had become of it. He made Ramjoy Sircar a dant and served him with a notice to produce the original bo

Ramjoy Sircar did not, however, produce the bond, nor appear in the suit, and criminal proceedings were taken again but unsuccessfully, to compel him to produce it.

The defendant Shama Sundari Bye who was alleged t executed the note denied having ever borrowed money from or having executed the bond in question.

The lower Courts held it to be satisfactorily proved t note had been executed as alleged, and registered under a p attorney executed by Shama Sundari Bye, and that the consi alleged had been paid to her father and applied to her use.

The Subordinate Judge gave the plaintiff a decree.

The District Judge, however, held that in as Shama Sundari Bye alleged that Ramjoy Sircar, who was had money constantly in hand, the *onus* was on the p show that the defendant had not been paid off before his The fact that the bond covenanted that the money should on the following Joysto, he considered as showing th was raised for a temporary emergency only, and did not a long continuing debt. He further held that the de not been able to show that the debt was in existence at the purchase, and therefore dismissed the plaintiff's suit.

From the decree of the District Judge this app preferred.

The appeal was first heard by MORRIS and PE these learned Judges having differed in opinion, it w before them sitting with PONTIFEX, *J.*

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Judgment.

PONTIFEX, *J.*

G. Gregory and Baboo *Gurudass Banerjee*, for the Appellant.

H. Bell and Baboo *Doorga Mohun Doss*, for the Respondent.

The following judgments were then delivered by the Court (1):—

PONTIFEX, *J.*:—The plaintiff alleges that defendant No. 1 ecuted a registered bond on the 28th March 1873 in favor of fendant No. 2 Ramjoy Sircar. That the bond was for Rs. 1000 d stipulated that that amount with interest at Rs. 3 per cent. per ensem should be paid in the month of Joisto 1280.

That in execution of a decree against Ramjoy Sircar, his terest in the alleged debt was put up for sale and was purchased the plaintiff for Rs. 200 on the 28th of December 1877, four ars and nine months after the alleged execution of the bond.

On the 12th of March 1878, nearly 5 years after its alleged ecution the plaintiff instituted the present suit against the alleged ligor; and he also made Ramjoy Sircar a defendant. He claimed at Rs. 2,783 was due on the alleged bond and asked for a decree that amount against defendant No 1.

Defendant No. 1, whom the Judge states to be a purdanashin y, by her written statement denied having even executed any h bond.

The plaintiff who has purchased for Rs. 200 does not appear have made any enquiry as to the existence of the bond. He k no steps to obtain possession of it, or to satisfy himself that it had really been executed by defendant No. 1, it still existed ancelled and untransferred by Ramjoy Sircar. This purchase s in fact a mere speculative purchase, and may have been a usive one.

In this suit the plaintiff neither produces the alleged bond nor s he adduce any evidence that it is still in existence uncancelled; that at the date of his purchase Ramjoy Sircar continued to be rested under it. But he made Ramjoy Sircar a defendant to the and served him with notice to produce the bond, which, however not produced. Nor was it shown to be in Ramjoy Sircar's session or power.

Upon this he sought to use a copy from the Registry office econdary evidence. But making Ramjoy Sircar a defendant

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and giving him notice to produce would not in my opinion e the plaintiff to use the copy from the Registry office as secon evidence against defendant No. 1.

The plaintiff can stand in no higher or better position Ramjoy Sircar would himself have occupied.

Before Ramjoy Sircar could have used secondary eviden would have been necessary for him to prove the destruction o of the alleged instrument.

But Ramjoy Sircar has not been examined; and a evidence stands, there is no poof of destruction or loss. F that appears, the bond, if really executed, might at the date institution of this suit have been cancelled or in the hands third party, a purchaser for value.

To admit secondary evidence under these circumstances w in my opinion, be most dangerous. And in as much as the pl purchased without requiring delivery or proof of the cont existence of the bond, he is not in my opinion entitled to clain benefit under the last part of clause *(c)* of section 65 of the dence Act. Otherwise he as assignee would be placed in a position than the obligee.

I am therefore of opinion that the decree of the Appellate Court is right, and that this appeal should be dis with costs.

So far as I have treated this as a Special Appeal upon we are unable to look at the evidence.

But as defendant No. 1 had in his written statement d execution of the bond, I asked the question of plaintiff's Co whether execution of the alleged bond had been proved. In a to my question the evidence was read to us.

None of the witnesses named as attesting witnesses on registered copy have proved the execution of the bond by d dant No. 1. One of such attesting witnesses was called, but he a ted that he did not see defendant No. 1 execute it. Another pe a servant, who was not named as an attesting witness was c and he stated that he saw defendant No. 1 execute a bond power of attorney to register it on the same occasion.

But a writer in the Registrar's office who says he has be the last 2 years out of employment, deposed that he had wit

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the execution of the power of attorney, and that the bond was not there at the time the power was executed.

Again according to the copy sought to be used in evidence, the bond if unpaid at the prescribed time in Joisto 1280, was to be paid by instalments and the payments were to be endorsed.

Therefore even if the bond had been executed there may be substantial reasons for its non-production. And no explanation is given why the bond has not been sued upon earlier; or why Ramjoy Sircar allowed a well-secured debt, which at the time of the plaintiff's purchase must have amounted to Rs. 2,500 at the least, to be sold for Rs. 200.

PONTIFEX, *J.*

Under these circumstances I should myself have had no hesitation in dismissing plaintiff's suit on the ground that he had not proved the execution of this alleged bond by the purdanashin lady. And these circumstances also show how dangerous it would be to let in secondary evidence in a case like the present.

MORRIS, *J.*

MORRIS, *J.*:—I quite agree with Mr. Justice PONTIFEX that the plaintiff as purchaser of a possible debt due under an alleged bond, cannot stand in a higher position than the obligee of that bond. When he sues to recover upon the bond, he must either produce it, or satisfactorily account for its loss or non-production, and unless he can show that the obligee had it in his possession and power when his interest in it passed to him, and failed to produce it, though called upon and legally bound to do so, he cannot be allowed to give secondary evidence of its contents, nor can the Court presume that it is still in force.

The appeal is dismissed with costs.

PRINSEP, *J.*

PRINSEP, *J.*:—The plaintiff in execution of a decree against Ramjoy Sircar on 28th December 1877 purchased the debt due to the said Ramjoy on a registered mortgage bond, dated 16th Cheyt 1279 (March 28th 1873, purporting to have been executed by Shama Sundari Bye. The law, Act VIII of 1859, nowhere provides for delivery by the judgment-debtor of such a bond, before sale, to the Court, or after sale, to the auction purchaser, but requires that "attachment shall be made by a written order prohibiting the creditor from receiving the debt and the debtor from making payment thereof to any person whatsoever until further orders of the Court." The sale apparently took place without any

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objection on the part of either the obligee (the judgment-debtor) the obligor Shama Sundari Bye.

The auction purchaser of the debt due to the obligee has sued to recover the full sum of money due on the bond with inte up to date and in this suit he has made Ramjoy Sircar the orig obligee a defendant as well as Shama Sundari Bye.

Shama Sundari Bye in her written statement denied that had taken any loan from Ramjoy Sircar or that she executed bond to him. She further stated that Ramjoy Sircar and ano person were her mooktears, that they always had cash in t hands, that they still owe her money, that they have never furni her with their accounts and that as she has not been able to ob possession of her papers which were with her father Kashi Si (deceased) she has not been able to sue them.

She next disputed the necessity specified in the bond for rowing the money, and contended that the copy of the bond by the plaintiff was not admissible in evidence. Several proc were issued for the attendance of the original obligee Ra Sircar with the bond but without any success, and a prosecutio the Criminal Court was instituted against him. It appears tha has died during the pending of the appeal in the District Jud Court. An attested copy of the bond obtained from the R tration Office was therefore tendered and received as secon evidence. When the case was first heard by Mr. Justice Mo and myself we differed on the only point raised, *viz.*, the presu tion arising from the non-production of the original bond, and have now heard this special appeal re-argued.

As I have the misfortune to differ from my learned colle in being of opinion that the order of the District Judge should set aside and a decree given to the plaintiff, it is necessary t should state my reasons for this opinion.

The District Judge on appeal has found in concurrence the first Court that "it is proved that in Cheyt 1279, B. S., a of Rupees 1000 was borrowed in the name and for the inter defendant Shama Sundari from her mooktear Ramjoy Sircar, a bond for the amount at 3 per cent. per mensem duly regis executed in his favor to secure repayment." The District J then expresses himself in the following terms:—"Now o woman's part, the substance of the defence, besides a false

the execution of the bond and contraction of the debt in 1279, nsists of a general assertion that Ramjoy Sircar as her agent had oney constantly in his hands belonging to her, and might there- re have cleared off any such debt. I consider that such a defence rows upon the plaintiff the *onus* of proving the actual existence a subsisting debt from the defendant to Ramjoy Sircar at the me of his purchase in December 1877."

"This certificate tells us that he bought the interest of Ramjoy rcar in the debt; he must further show what that interest at e time was. It is too much to presume that because a debt s contracted in 1279 B. S. under an express arrangement that e said debt should be extinguished in three months, it was refore subsisting seven years afterwards. The possession of a nd by the creditor raises the presumption of the subsistence of e debt, but here the creditor does not produce the bond. For all we ow the debt was extinguished in 1280 Joyst as agreed, and the nd handed back to the woman's father. It would be very hard expect a purdanashin woman after her creditor is dead, and her ther, who managed her affairs is dead, to prove by positive idence that a debt contracted seven years before, has been actually id off, especially when the creditor was her trusted agent, d there is nothing whatever on the other side to raise a esumption of the subsistence of the debt at the present day. I ink the Subordinate Judge has been in error in laying any such us on the woman. The non-production of the original bond the plaintiff raises a presumption against the subsistence of a bt. If he meant to make his speculative purchase effective he ould have got the bond, if any such bond was then in the ssession of Ramjoy Sircar."

As I understand the ground upon which the plaintiff is con- dered to have failed in this suit it is, that because he has been able to produce the original mortgage bond, it is to be presumed at it is not in the possession of the obligee and consequently that debt to him existed at the time of sale. His purchase is con- mned as speculative, and though he has purchased at a public action held by a Civil Court and done all that can possibly be pected from him to obtain the necessary evidence of the debt, d though the defendant obligor has never stated that the debt s been paid off nor indeed pleaded any payment at all, we are

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to give her the benefit of a liquidation in full of a debt fou have been contracted on her behalf, the money having been ap to her benefit.

No doubt all purchases of debts through the Courts in e tion of a decree must generally be speculative because in m every case the judgment-debtor is obstinately passive. The C of Civil Procedure, however, have always recognized debts as able property, and though under the present Code of 1877 enq is made before sale to ascertain with as much accuracy as pos the exact property to be sold, no such provision existed under law of 1859 under which the sale now under consideration held. A purchaser, like the plaintiff, would therefore have l means of ascertaining what he purchased except that in the pre case he would have something tangible in the knowledge that debt was secured by a registered instrument and though the obl was not bound to appear on service of the notice of attachn under section 236 Act VIII of 1859 to deny the existence of debt, he would be entitled to draw some inference from her appearance. Further I would observe, the Court under Act V of 1859 had no power to compel the appearance of the judgm debtor or the production of any instrument forming evidence the debt under sale and therefore a purchaser would be at a disadvantage in establishing the debt when the entire evide might be in the hands of one who like Ramjoy Sircar has persiste declined to appear. That has, as far as my experience goes, b the practice in the Mofussil Court.

Now as regards possession of the original bond it is clear t originally it was with Ramjoy Sircar the obligee and as I und stand the law, the presumption would be that it has so remain It is not for us to suggest what may have happened. There been the publicity of a public sale in Court, and we have in present case the additional security that even supposing that it been transferred to a third party it could no longer be made subject of a suit as the claim has become barred by limitation.

It has, however, been stated that before being ing the pre suit, the plaintiff should have sued Ramjoy Sircar for delivery the bond, but the uselessness of such a proceeding is shown what has happened in the present case. Ramjoy would not h appeared, and with an *ex-parte* decree plaintiff would be in

better position than he now is without the expense of such a suit. It appears to me that the plaintiff has done all that is in his power to prove his case, and that in the absence of any proof even of any plea of payment on this bond we are bound to give him a decree.

It has been suggested that the plaintiff may have colluded with Ramjoy Sircar, but this is amply explained away by his action in prosecuting him criminally for not appearing in answer to process of the Court to produce this bond. We should be more justified in imputing collusion on the part of the female defendant with Ramjoy Sircar, her old servant, to evade payment of a portion of her debt by inducing him to withhold production of the bond.

We have it found in two Courts that the bond was executed by the defendant Shama Sundari, that it was duly registered under a power of attorney executed by her, and that the money was paid to her father Kashi Singh and applied to the payment of Government revenue due for her estates. With these findings and in the absence of any allegation of payment of any portion of the debt it appears to me that the plaintiff is entitled to a decree. Evidence of any payment would clearly be in the hands of Shama Sundari, and if, as has been thrown out at the second hearing of this special appeal for the first time, the bond itself might bear evidence of this by endorsements of payments, we should expect that this would have been the obligor's case, and that she would have united with plaintiff in requiring the production of the original bond. The evidence in this case has been read to us, though we are sitting in special appeal, and that shows that whatever may be the value of the direct evidence as to the execution of the bond by Shama Sundari and that has been believed by two Courts, there can be little doubt that she executed the power of attorney to her father Kashi Singh and another to register it and that in that mookhtarnamah the bond is so described as sufficiently to connect it with the bond now set up, and while referring in passing to the evidence I would remark that the first Court finds that "no money was kept with Ramjoy Sircar, and no revenue was paid from such a fund as alleged by the defendant," but the District Judge on appeal merely states that Ramjoy Sircar "the creditor was her trusted agent." The transaction was, however, conducted on behalf of the lady by her father Kashi Singh against whom nothing has been said, and,

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UMESH CHUNDER GHOSE v. SHAMA SUNDARI BYE.

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to say the least of it, it has been left doubtful whether Ramjoy had any other money dealings with Shama Sundari. If anything turned on this we ought to remand the case to the District Judge to determine this point.

We have therefore in the present case the finding of the Lower Court that the bond was executed by the defendant, that the money paid on it was received by her father and applied to her use, and, in my opinion, it follows that the *onus* lies on her to prove payment. It is not for us to suggest for her what she has never said in her defence, or to consider what may have become of the bond itself. It is sufficient I conceive that execution of the bond has been proved and that defendant has received the benefit of the money paid. She has not attempted to plead any repayment of that debt. I would therefore give plaintiff a decree.

[CIVIL APPELLATE JURISDICTION.]

1881.
March 18th.

Nos. 328 and 338 of 1880.

AZIZOONNESSA KHATOON, (JUDGMENT-DEBTOR) APPELLANT;

AND

KALLY CHURN SEN AND ANOTHER (DECREE-HOLDERS) ..... RESPONDENTS.

Act VIII (B. C.) of 1869, sections 59 and 60, Sale of under-tenure under,—Sale procedure—Act VIII (B. C.) of 1869, section 34—Civil Procedure Code, Act X of 1877, section 647.

Having regard to the provisions of section 34 of Act VIII (B. C.) of 1869 and section 647 of the Code of Civil Procedure, it is clear that the sale procedure to be followed at a sale of an under-tenure sold under the provisions of the former Act, is that laid down in Chap. XIX of the Civil Procedure Code.

APPEALS from orders passed by the First Subordinate Judge of Backerguuge on the 2nd September 1880.

1881.

AZIZOONNESSA KHATOON v. KALLY CHURN SEN.

Judgment.

In these appeals the appellant sought to set aside the sale f certain under-tenures which had been sold in execution of decrees or arrears of rent, on the ground of material irregularity in pub- shing and conducting the sales and of substantial injury resulting herefrom.

The Subordinate Judge was of opinion that the Rent Law did ot provide any procedure for setting aside sales of this kind, such i is provided by the Code of Civil Procedure in respect of sales ld in execution of decrees made under that Code.

He accordingly dismissed the applications made to him on e ground that he had no jurisdiction to interfere.

Against his order the persons aggrieved have preferred these peals.

Baboo *Burkant Nath Dass*, for the Appellant.

Moonshee *Serajul Islam*, for the Respondents.

The judgment of the High Court (1) was as follows:—

We think that the order of the Subordinate Judge in these ree cases is an erroneous one. It appears that a certain under- ure was sold in execution of a decree for rent; and after this e, an application was made to the Subordinate Judge under tion 311 of the Code of Civil Procedure to have the sale set de on the ground of material irregularity in publishing or con- cting it, together with substantial injury caused by reason of ch irregularity.

The Subordinate Judge was of opinion that the provisions of ction 311 of the Code of Civil Procedure did not apply to the le of an under-tenure, to a sale held, as he puts it, under the pro- sions of sections 59 and 60 of the Rent Act. He says that ction 311 of the Code of Civil Procedure can only apply to sales ade under Chap. XIX of the same Code, and that, in as much as e sale of the under-tenure was made under the provisions of the nt Law, it was not a sale made under the provisions of Chap. XIX the Code of Civil Procedure.

Now, sections 59 and 60 of Act VIII (B. C.) of 1869 do not ntain any sale procedure. Section 59 provides that, when an der-tenure is ordered to be sold, a notice of such sale shall be hung

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1881.

AZIZOONNESSA KHATOON v. KALLY CHURN SEN.

Judgment.

up in certain places and shall otherwise be notified in a particul manner. This mode of notification differs in some respects fro the provisions of the Code of Civil Procedure on the same subje Section 60 contains instructions as to the contents of such noti and here also there is a difference between these provisions and t corresponding provisions of the Code of Civil Procedure. These tw sections, or any other portions of the Rent Act, VIII (B. C.) 1869 do not, however, contain any provisions as to the manner i which the sale is to be conducted, the person by whom the pr perty is to be sold, the manner in which the biddings are to made, the amount to be deposited by the purchaser and all the other matters which taken together constitute the sale procedu The question then is where are we to look for this procedu Before the passing of Act VIII (B. C.) of 1869, this sale procedu was contained in Act VIII (B. C.) of 1865. That Act h not been incorporated in Act VIII of 1869, and it appears us that there can be no doubt that the sale procedure in the ca of an under-tenure must be sought for in the Code of Civil Pr cedure. This seems to follow from the provisions of section 34 Act VIII (B. C.) of 1869, which directs that "save as in this A is otherwise provided suits of every description brought for a cause of action arising under this Act and all proceedings there shall be regulated by the Code of Civil Procedure." If there c be any possible doubt as to these words being sufficiently wide include proceedings such as those in the case now before us, th doubt is removed by the provisions of section 647 of the Code Civil Procedure which enacts that "the procedure herein prescri shall be followed in all proceedings in any Court of Civil Jurisd tion other than suits and appeals." It is therefore clear that sale procedure under which an under-tenure is sold is to be sou for in the Code of Civil Procedure; and it follows with refere to the special language of section 311 that an under-tenure is re sold under Chap. XIX, that is in accordance with those provisi as made applicable to rent suits by the sections above quoted. think therefore that the order of the Subordinate Judge in th cases must be set aside, and that he must be directed to enter and proceed with the petition of objection made under section 3 The costs will abide the ultimate result of the proceedings.

[CIVIL APPELLATE JURISDICTION.]

NDER PERSHAD SINGH, (PLAINTIFF)..... APPELLANT;

AND

. CAMPBELL, (DEFENDANT)..... RESPONDENT.

1881.
March 23*rd*.

No. 1735 of 1879.

ecific Relief Act, I of 1877, *section* 40—*Contract Act, IX of* 1872, *section* 56—*Rescission of Contract in part impossible of performance—Void Contract—Cancellation of Contract—Contract, Partial Cancellation of.*

The plaintiff, who had contracted with the defendant to grow indigo for nine years on lands A and B, having been four years after the commencement of the contract ousted from the first named lands, through no neglect or omission on his own part, but under a decree for ejectment obtained against his immediate landlord under section 52 of Act VIII (B. C.) of 1869, sued to have the contract rescinded so far as it had become impossible by reason of the events which had happened.

Held, that although under section 56 of the Contract Act the plaintiff was not strictly speaking entitled to sue for rescission of the Contract, yet under section 40 of the Specific Relief Act he was entitled to have the contract cancelled so far as it related to the growing of indigo on land A.

APPEAL from a decree of the First Subordinate Judge of Mozufferpore, dated the 14th May 1879 reversing the decree of the Moonsiff of Hajeepur, dated the 27th June 1878.

The plaintiff in this case sued to have a contract entered into etween himself and the defendant rescinded.

Under the contract the plaintiff had agreed to grow indigo for period of nine years from 1281 to 1289 on 20 bighas 10 chittacks f land, of which 10 bighas 10 chittacks were held by him in Rutnpara on a sub-lease from the Bhadowlie Factory, the remaining bighas being his own milkiut in mouzah Keeratpore. The efendant was the manager of the Karharrie Factory.

It appeared that the plaintiff had been ousted from his jote in uttunpara in 1284 under a decree for ejectment made under

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Judgment.

section 52 of Act VIII (B. C.) of 1869, against his superior land lords, the proprietors of the Bhadowlie Factory.

The Moonsiff by his decree rescinded the contract so far as related to the 16 bighas 10 chittacks in Ruttunpara.

On appeal the Subordinate Judge was of opinion that the plaintiff might have saved his jote by paying the amount of the decree against his superior landlords, and that the contract could not to any extent be declared void by reason of circumstances brought about, as he considered, by the omission or neglect by the plaintiff. He accordingly held that the plaintiff could not be relieved from liability for any loss which the defendant might sustain by reason of the non-performance of the contract, and dismissed the plaintiff's suit.

This second appeal was thereupon preferred to the High Court

G. Gregory and *M. L. Sandel*, for the Appellant.

Baboo *Unnoda Pershad Banerjee*, and Baboo *Aubinash Chunder Banerjee*, for the Respondent.

The judgment of the High Court (1) was as follows :—

In 1874 the plaintiff Indur Pershad Singh engaged to sow 20 bighas of land with indigo yearly for nine years (1281-1289 F.) in consideration of a sum of 41 Rupees paid to him at the rate of 2 per bigha, by Mr. W. Campbell of Karharrie Factory. The land lies in two villages, *viz.*, 16½ bighas lie in the village of Ruttunpara, plaintiff being an under-tenant of this land; and 4 bighas in the village of Keeratpur, plaintiff being the proprietor of this land.

In 1284 F. (1876-77) the proprietor of Ruttunpara ejected the superior tenant under whom plaintiff held the 16½ bighas in that village, and plaintiff's occupancy of that land then ceased.

The present suit is brought by the plaintiff to be relieved from the contract entered into in 1874 so far as the 16½ bighas in Ruttunpara is concerned. It appears from judgment in this case that the defendant Mr. Campbell brought a suit No. 59 of 187 against the plaintiff to recover damages for non-fulfilment of the entire contract.

The plaintiff thereupon brought this suit No. 100 of 18

(1) MITTER and MACLEAN, *JJ.*

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Judgment.

stated above and another suit No. 101 of 1878 for the price of ligo plant supplied in 1282, 1283, 1284, and the three suits re tried together in the Moonsiff's Court. The suit against the aintiff was decreed in respect of the Keeratpur lands, but dismissed regards the Ruttunpara lands. Plaintiff's suit No. 100 was creed, and his contract cancelled in respect of the 16½ bighas of id in Ruttunpara. Plaintiff's suit No. 101 was dismissed.

On appeal to the Subordinate Judge the plaintiff's suit . 100 was dismissed on two grounds: (1) that the impossibility perform the contract by reason of loss of the 16½ bighas was used by the plaintiff's neglect to preserve the lands and therefore at clause 2 of section 56 of Act IX of 1872 did not apply; (2) that e grounds upon which a contract can be rescinded as laid down in tion 35 Act I of 1877 were not applicable to this case.

Plaintiff has therefore brought this appeal to this Court. We e not definitely informed as to the subsequent history of cases s. 59 and 101, but being cases of a Small Cause Court class they uld not ordinarily come before this Court in second appeal.

The grounds of appeal are directed against the two proposi-ns laid down by the Subordinate Judge.

The appellant relies on section 56 Act IX of 1872 and argues at his contract has become void, since it was made impossible. here can be no doubt that his contention is strictly true, and the cond clause of the section plainly shews that the contract to the tent that it had become impossible had become void. The Subor-nate Judge considers that the plaintiff or promiser could have revented the impossibility, but on this point we are not in posses-on of full materials for an opinion. The mere fact that the laintiff might have paid up the amount of the decree against the hadowlie factory and thus saved the factory, and himself as its enant, from ejectment is not enough. We are informed it was a ecree for rent and for ejectment under section 52 Act VIII B. C.) of 1869, but it may be that the decree was for a sum which he plaintiff could not reasonably be expected to pay considering at he would have no security for his payment. The law which lows any one interested in protecting a tenure from sale to pay a decree gives him full security in the shape of a right to take ssession of the tenure—section 62 Act VIII (B. C.) of 1869—but is is not the case under section 52 of the same Act. We cannot

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therefore say that the plaintiff lost his land from an omission m by his own neglect, and in our opinion the contract became void to the 16½ bighas when the proprietor of Ruttunpara came i possession of the land.

We are of opinion that the Subordinate Judge was correct holding that Chapter IV of the Specific Relief Act did not app Strictly speaking the plaintiff had no right to sue for rescission the contract in part. We must refer to the Contract Act itself see under what circumstances a contract is voidable or terminal and we think that none of the provisions for voiding or termin ing a contract exist in this case. But we think that Chapter of the Specific Relief Act may be resorted to.

We have shown that the contract was void in part, and secti 35 allows a person against whom an instrument is void to sue have it adjudged void. Section 40 provides for the partial canc lation of an instrument which is evidence of different rights a obligations, and we think that their instrument in this case evidence of an obligation to cultivate indigo in different villag and that it is a proper case for the application of section 40. W shall therefore cancel it so far as it obliges the plaintiff to cultiv 16½ out of 20 bighas with indigo or to cultivate land in Rutt para village.

It is only necessary to remark that the defendant's contenti that the plaintiff is bound to make good the full quantity of la from lands in his possession in villages other than Ruttunpara not borne out by the terms of the contract. The instrume specifies the lands in each of the two villages of Ruttunpara a Keeratpur which plaintiff engaged to sow with indigo, but wh it provided for the substitution of other lands for those contract for in Keeratpur of which plaintiff was a proprietor, it is silent to the substitution of lands for those in Ruttunpara of which was only a tenant.

We think it unnecessary to provide for compensation to t defendant beyond the restoration of the consideration of Rs. or Rs. 2 per bigha, for the lands in respect of which we cancel t contract, and this sum the plaintiff has offered to pay.

We reverse the decree of the Subordinate Judge and rest that of the Moonsiff. The defendant will pay the plaintiff's co in this Court and in the Lower Appellate Court.

[CIVIL APPELLATE JURISDICTION.]

1881.
March 12*th*.

No. 1614
1879.

AZIR MAHTON, (DEFENDANT) ..... APPELLANT;

AND

UBT SINGH, (PLAINTIFF) ..... RESPONDENT.

ward—Act VIII of 1859, *section* 325—*Irregularity—Appeal from judgment on award.*

There is no appeal from a judgment under section 325 of Act VIII of 1859 upon an award.

Maharajah Joy Mungul Singh v. *Mohun Ram Marwaree*, 23 W. R., 429; *Gunga Narain Ghose* v. *Ram Chand Ghose*, 12 B. L. R., 48; and *Boonjad Mathoor* v. *Nathoo Shahoo*, I. L. R., 3 Cal., 375, distinguished.

APPEAL from a decree passed by the Additional Judge of Patna, ted 4th May 1879, affirming a decree of the Additional Subor- nate Judge of Patna, dated the 19th December 1877.

The matter in this suit, which was to recover Rs. 1,811-4-9 in spect of the produce of certain land, was referred to arbitration on e 14th September 1877. The Subordinate Judge on the 17th ptember fixed a week's time for the return of the record with the bitration award. On the 26th September, before the award was de, he recalled the record, but on the 28th September it was sent ck to the arbitrator, the 15th November 1877 being fixed for the al hearing of the case.

Another order was passed that the award should be made before e *dussehra* vacation.

The award was actually made and filed on the 12th November 77. On the 16th the defendant filed objections to the award, t on the 19th December the objections were disallowed and dgment passed in terms of the award.

It had been objected that the award was not made within time, t the issues had been altered, and that certain witnesses of the endant had not been examined. The Subordinate Judge held that arbitrator had power to alter the issues, and that the issues tried by

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Judgment.

him were not improper. He also held that the award was with time, and that the allegation that the defendant's witnesses had been examined was untrue. On appeal the same objections were urged before the Additional Judge. It was also urged that the Court had no power to refer the case again to the arbitrator after having once recalled the record of the case from him.

The Additional Judge dismissed the appeal on the ground that the judgment, which was in conformity with the award, was final under section 325 of Act VIII of 1879.

This second appeal was thereupon preferred to the High Court by the defendant, the chief ground of appeal being that there was no legal award in as much as the arbitration proceedings had been superseded by the Subordinate Judge having recalled the record on the 26th September 1877.

C. Gregory and *M. L. Sandel*, for the Appellant.

Baboo *Mohesh Chunder Chowdhry* and Moonshee *Mahomed Yusooof*, for the Respondent.

The judgment of the High Court (1) was as follows :—

This is a second appeal against a decree in conformity with the award made by an arbitrator. The first Court held that the objections raised by the defendant should be disallowed, and passed a decree in conformity with the award. The second Court expressed its opinion that the faults which it found with the award were such as would allow it to disturb the judgment.

It has been strenuously contended before us that the proceedings in the first Court were such as to make it incumbent on the Lower Court to hear the appeal on the merits. This objection we may say at once cannot be supported. If the decision of the first Court for any reason was not final the second Court could do no more than remand the case to that Court for disposal on the merits.

The case being governed by the old Code of Civil Procedure we have to determine whether there was an award and a judgment in conformity therewith. If so by section 325 of that Code the second Court had no jurisdiction to hear an appeal, or to express any opinion on what had passed in the first Court.

It has been contended that under section 318 of Act V

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359, there was no award at all on the ground that the Court in which e suit was pending superseded the award and recalled the suit. pparently such an order was made on the 26th September 1877, but did not take effect because, as we understand the proceedings, the se was again returned to the arbitrator at the request of the rties expressed through their pleaders on the 28th September. oreover this objection if it was taken was not one of those urged fore the first Court, and although it was taken in the second urt, no opinion seems to have been given upon it.

We must we think take it that the case was duly left in the nds of the arbitrator who made an award on the 12th November 77.

Objections were urged to the award which in the opinion of s Court did not justify it in remitting it under section 323, or in ting it aside under section 324 of Act VIII of 1859. Judgment s therefore given according to the award.

A number of cases have been referred to as supporting the pellant's contention that an appeal will lie notwithstanding the visions of section 325 that a judgment according to an award ll be final. But the only cases in which an appeal has been wed are to be found in 23 W. R., 429; 12 B. L. R., 48, and L. R., 3 Cal., 375. In the first of these cases the decree on the ard had on previous occasions been set aside on account of an formality in the proceedings of the arbitrators (see 8 B. L. R., 9, footnote), and then, on rectification of the informality, the cond decree was held to be final.

In the other two cases there were such irregularities patent on e face of the proceedings in the case that the judgments were ld not to be judgments under section 325.

In the present case we are not able to say that there are any unds for holding that there has not been an award and a judgnt in conformity therewith. We therefore think that no appeal to the second Court, and we dismiss this appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

1881. *April 26th.*

No. 2837 of 1879.

BURHUNUDDI HOWLADAR, (DEFENDANT) ... APPELLANT;

AND

MOHUN CHUNDER GUHA, (PLAINTIFF) ..... RESPONDENT.

Enhancement—Enhanced rent, Special agreement to pay for specific period—Tenant holding over—Landlord and tenant.

The defendant being, under a settlement originally obtained from the Government, bound to pay a particular rent to the plaintiff who had subsequently to that settlement obtained an ijarah from the Government, the plaintiff in 1879, sued to enhance that rent and obtained a decree upon which a compromise was made, the defendant agreeing to pay a higher rent for the years 1281 and 1282.

The defendant having paid no rent for 1283 and 1284, the plaintiff sued for the arrears at the higher rent.

Held, that no proper proceedings for enhancement having been taken or fresh contract with the defendant entered into, the special arrangement came to an end at the expiration of 1282 and the original arrangement revived, and therefore the plaintiff was not entitled to demand more than the original rent payable.

APPEAL from a decree passed by the Officiating Judge of Backergunge, dated the 11th September 1879, reversing the decree of the First Subordinate Judge of that district, dated the 10th December 1878.

In 1271 the plaintiff purchased at an auction sale the rights of a defaulting *abadkari taluqdar* with whom the Government had made a 20 years' settlement terminating in 1282. The settlement was renewed with the plaintiff for one year in 1283 and again for two years in 1284.

The defendant who was an "*osat howldar*" had a permanent tenure at a rent of Rs. 961-2-7 from the Government granted prior to the original settlement with the plaintiff's predecessor.

In 1279 the plaintiff obtained a decree in an enhancement suit against the defendant. An appeal was preferred by the defendant.

dant, but it was compromised in 1280 by a solenamah which the defendant executed agreeing to pay until the end of 1282 an enhanced rent at the rate of Rs. 1550 in lieu of his former rent.

The present suit was to recover arrears of rent for the years 1283 and 1284 at the enhanced rate.

The defendant denied his liability to pay more than the old rent, because the period for which he had agreed to pay the larger rent had expired at the end of 1282.

The Subordinate Judge held that the contention of the defendant was correct.

On appeal the Subordinate Judge reversed the decree of the Subordinate Judge. He was of opinion that the defendant was to be treated as holding on after the term of his agreement had expired and therefore on the authority of *Sheikh Enayutoollah* v. *Sheikh Elaheebuksh*, W. R. Gap. No. Act X Rulings, 42, *Tara Chunder Banerjee* v. *Ameer Mundul*, 22 W. R., 394 and *Sheo Sahoy Singh* v. *Bechun Singh*, 22 W. R., 31, as holding on the terms of the agreement.

From the decree of the District Judge giving the plaintiff the amount claimed by him the defendant appealed.

Baboo *Kali Mohun Dass*, for the Appellant.

Baboo *Troyluckyonath Mitter*, for the Respondent.

The judgment of the High Court (1) was as follows:—

The defendant who is the appellant before us made a settlement with the Government under which he got a permanent tenure at a rent of Rs. 961-2-7. Subsequently to this settlement, the plaintiff got an ijarah settlement from Government which was from time to time renewed and which upon one renewal terminated at the end of the year 1282. During that ijarah settlement the plaintiff sued the defendant for enhancement of his rent and in the first court obtained a decree. The defendant, however, appealed and the suit was ultimately compromised by a solenamah under which a special arrangement was made between the parties that for the years 1281 and 1282 the defendant should pay the rent of Rs. 1550 instead of the original rent Rs. 961-2-7. The plaintiff subsequently renewed his ijarah settlement with

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1881.

BURHUNUDDI HOWLADAR v. MOHUN CHUNDER GURA.

Judgment.

Government, and he now sues defendant for rent of the years 1283 and 1284 at the rate of Rs. 1550 agreed to by the solenamah, whereas the defendant insists that he is only bound to pay the rent of Rs. 961-2-7 which was reserved under the original arrangement with Government. The first Court has given the plaintiff a decree for rent at the rate of Rs 961-2-7 only, but the Lower Appellate Court has altered that decision and given the plaintiff a decree for the rent of Rs. 1550 as arranged by the solenamah. We think the position of the parties was this:—that there was an arrangement between the plaintiff who succeeded to the rights of the Government, and the defendant as having originally obtained a settlement from Government, that the defendant should pay rent at the rate of Rs. 961-2-7; that arrangement was altered by a special agreement which was confined to the years 1281 and 1282 only; so that at the expiration of the year 1282 that special arrangement came to an end and the original arrangement received. We think, therefore the plaintiff was not entitled to demand as rent for the years 1283 and 1284 more than Rs. 961-2-7, that being the amount originally agreed to, unless he took proper proceedings for enhancement or made a fresh contract with the defendant. He has not taken proceedings for enhancement but has merely sued for rent at the rate of Rs. 1550. Even apart from the reasons I have given, there would seem to be good ground in this case why the rent of Rs. 1550 at all revents should not be supported; for it appears that after the execution of the solenamah the district was visited by a cyclone, and there are grounds stated by the defendant to show that he would be entitled probably to a remission of something from the rent of Rs. 1550, if that were the rent which would now be payable for the property. We are of opinion, however, that the solenamah being a special arrangement and being confined to the years 1281 and 1282 can no longer govern the relations between the parties, and that the plaintiff is only entitled to the decree given him by the Subordinate Judge. We accordingly reverse the decision of the Officiating Judge and restore that of the Subordinate Judge with the costs of this appeal and of the lower Courts.

[CIVIL APPELLATE JURISDICTION.]

1881.
May 3rd.

Nos. 2839, 2840 of 1879.

BURHUNUDDI HOWLADAR, (ONE OF THE DEFENDANTS) ..... APPELLANT;

AND

MOHUN CHUNDER GUHA, (PLAINTIFF) ..... RESPONDENT.

Enhancement—Eahanced rent, Agreement by one of several co-sharers to pay in respect of whole tenure—Acquiescence.

One of the holders of an under-tenure having agreed with his immediate landlord that an enhanced rent should be paid in respect of the tenure, the enhanced rent fixed was paid for some years, when, default being made, the landlord brought a suit against all the joint-holders for arrears of rent at the enhanced rate.

Held, that the landlord was entitled to rent at the rate claimed, until circumstances were shown from which it would follow that the rate claimed was not the fair and equitable rate payable.

Held, further, that the holder by whom the agreement to pay the enhanced rent was made, was not solely liable to pay that rent, but that the tenure was also liable, and that if it could be shown that the other holders had acquiesced in the agreement they were likewise responsible.

Burhunuddi Howladar v. *Mohun Chunder Guha ante*, p. 508 distinguished.

APPEALS from a decree passed by the Officiating Subordinate Judge of Backergunge, dated the 12th April 1879, modifying the decree of the Officiating Moonsiff of Dakhinshabazpore, dated the 15th March 1879.

This suit which was to recover from the defendants arrears of rent at a particular rate was heard together with a similar suit brought by the same plaintiff, and both suits were disposed of in the Courts below by the same judgment.

In the present case the plaintiff sought to recover rent in respect of the holding of the defendants at the rate of Rs. 125-11-9 per annum.

1881.

BURHUNUDDI HOWLADAR v. MOHUN CHUNDER GUHA.

Judgment.

It was contended by the defendant that the rate payable was Rs. 88-3.

It was found, however, that Burhunuddi, one of the defendants, had agreed to pay in respect of the entire holding Rs. 125·11·9, the amount claimed by the plaintiff, and that this rent had been regularly paid for four years, receipts being in each case given for the amount.

The Moonsiff gave the plaintiff a decree for the amount admitted by the plaintiffs. On appeal the Subordinate Judge held that the rent which had been paid for the years previous to the time for which the arrears were now claimed must be held to be the fair and equitable rent payable, until it be shown by the persons bound to pay rent that it was not so, and that as this had not been shown, the plaintiff was entitled to a decree for the amount claimed by him. By his decree, however, it was directed that the whole of the enhanced rent should be paid by the defendant Burhunuddi.

That defendant preferred this appeal to the High Court.

Baboo *Kali Mohun Dass* and Baboo *Bhoobun Mohun Dass*, for the Appellant.

Baboo *Troyluckyo Nath Mitter*, for the Respondent.

The judgment of the High Court (1) which was follows was delivered by—

PONTIFEX, *J.*

PONTIFEX, *J.* :—We think the judgment of the Officiating Subordinate Judge in this case must be upheld. The distinction between this case and No. 2837 (reported *ante*, p. 508) which was before us the other day is that in that case a solenamah was executed which confined the payment of the enhanced rent to a particular period. In this case there was no solenamah taken, but Burhunuddi, who was one of the co-sharers in the tenure, went to the zemindar and agreed on behalf of himself and his co-sharers, whether with or without authority, that he would pay increased rent, and there was nothing in that agreement to confine the payment of such increased rent to any particular period. We think, therefore, that it must be taken that the increased rent was the fair measure of rent to be paid for the premises, and that rent would continue payable until circumstances were shown from which it would follow that the rent ought to be

(1) PONTIFEX and FIELD, *JJ.*

creased. The decree given by the Lower Appellate Court is t Burhunuddi, who negociated this arrangement, should be held ne personally responsible for the increased rent.

But the tenure itself would also be liable, and if, therefore, rhunuddi's co-sharers refuse to recoup him for the rent which he uld have to pay to the zemindar, he could be entitled to get it m the profits of the tenure itself. If it could be shown that he reed, without authority from them, to this increased rent, then ay be that he will not be entitled, as against them, to insist t they should contribute to the payment, but we think, in much as the increased rent has been paid for the period of four rs, it may be assumed that the co-sharers have acquiesced in amount, for in the ordinary course of business it must be med that they have asked for and seen the receipts for rent en during that period, and from those receipts they must have wn what amount of rent was paid, and if they knew the ount, then they must be taken to have acquisced in the arrange- t made by Burhunuddi and ratified that arrangement, and refore they would be answerable to Burhunuddi for any payment le under that arrangement. The appeal, therefore, will be dis- sed with costs. This judgment will govern No. 2840 of 1879 ch will also be dismissed with costs.

CRIMINAL JURISDICTION.]

DAMODUR BEDYADUR AND ANOTHER ..... PETITIONERS

AND

SHYAMANUND DEY AND OTHERS .....

1881. May 29th.

No. 109 of 1881.

Criminal Procedure Code, Act X of 1872, section 530—Preliminary proceeding before Magistrate—Dispute likely to give rise to breach of peace—Jurisdiction.

It is not sufficient to give a Magistrate Jurisdiction under section 530 of the Code of Criminal Procedure for him to record his final judgment an opinion or proceeding, that it is probable that a breach of the peace will occur if proceedings under the section be not taken.

MOTION to set aside an order passed under section 530 of Act X of 1872 by the Deputy Magistrate of Balasore.

The petitioners in this case, who were Mourosee Mukuddum of mouzah Shahpore, of which Rajah Shyamanund Dey and others were the zemindars, alleged that the mouzah comprised 1396 muns of which 1100 muns had been marked as waste-lands at the time of the survey in 1840; that they or their predecessors in title had been in possession since 1267, and had during that period gradually brought the waste-lands into cultivation.

In 1874 a suit was instituted by the petitioner against one Fakir Rout for rent in respect of portion of the land brought into cultivation, and in that suit the zemindars applied to intervene claiming the land as in their khas possession, but their application was disallowed and the petitioners obtained a decree.

The zemindars thereupon filed a suit claiming the land the subject-matter of the suit brought by the petitioners. This suit was ultimately dismissed by the High Court on the 9th July 187

On the 15th October a petition was presented by one Boneoma Dass who was described as a karpurdaz of the zemindars, on the 15 October 1880, praying that he might be retained in possession certain Jalpai lands by an order under section 530 of Act X of 187

Thereupon without recording any proceeding the Deputy Magistrate to whom the petition was presented made an or

that both parties do file their written statements on the 20th ovember."

Evidence was afterwards gone into, and on the 14th February 880, the Deputy Magistrate passed an order declaring the zemin- rs to be entitled to hold the whole 1100 muns claimed by the titioners in respect of portion of which they had obtained a decree already stated.

The petitioners now prayed that that order might be set aside r the following among other grounds:

(1) That no proceeding had been recorded by the Deputy agistrate stating the grounds upon which he was satisfied that a spute likely to induce a breach of the peace existed.

(2) That there was nothing to show that he was, before the stitution of these proceedings, satisfied that there was a likelihood a breach of the peace.

(3) That in as much as the petitioners' tenants were in ssession no order ought to have been made under section 530 of Criminal Procedure Code.

In his judgment the Deputy Magistrate stated that he con- ered it was probable that a breach of the peace might have curred if proceedings under section 530 were not taken.

Branson and Baboo *Umbica Churn Bose*, for the Petitioners.

M. M. Ghose and Baboo *Obhoy Churn Bose*, *Contra*.

The judgment of the High Court (1) was as follows:—

In a proceeding under section 530 of the Criminal Procedure ode between the petitioner and the opposite party regarding the ossession of 1100 muns Jalpai lands, the Deputy Magistrate of alasore on the 14th February last confirmed the opposite party in ossession. The record shows that no preliminary proceeding tating the grounds upon which the Magistrate was satisfied that dispute likely to induce a breach of the peace existed was recorded. robably on this ground at the final hearing objection was taken to e jurisdiction of the Magistrate and he deals with this question the final judgment.

One of the grounds upon which this rule was obtained was at the Magistrate having omitted to record the preliminary

(1) MITTER and MACLEAN, *JJ*.

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DAMODUR BEDYADUR v. SHYAMANUND DEY.

Judgment.

proceeding referred to above, the whole proceeding was *ultra vi* and therefore should be set aside. It has been contended on b half of the opposite party that as the final judgment shews th the Magistrate was satisfied of a dispute likely to induce a brea of the peace existing, the mere omission to record a prelimin proceeding as is required by the 2nd para. of section 530 is immaterial irregularity which would not warrant this Court und section 283 of the Criminal Procedure Code in quashing the pr ceedings of the Lower Court. On the other hand it was broad contended that the omission to record this proceeding is, und *all circumstances*, a fatal error which would justify this Court setting aside the proceeding, the provisions of section 283 n withstanding. The decision in the case of *Sheikh Munglo* v. *Du Narain Nag*, 25 W. R., 74 certainly supports this contenti But there is a decision reported in 22 W. R., 81 which rules contrary.

Whether the one or the other contention is correct it is cl to us upon the authority of the cases cited below that a Magistr would have no jurisdiction under section 530, unless he was satis that there exists a dispute concerning land, which dispute is lik to induce a breach of the peace, *i. e.*, there must be a reasona apprehension that a disturbance of the peace is likely to occur n dering it necessary for the Magistrate to take immediate act under section 530 to prevent the apprehended breach of the pe See 4 W. R., Cr., 26; 5 W. R., Cr., 14; 9 W. R., Cr. 64; 3 B. L. Crim., 76; 9 B. L. R., 229; 22 W. R., 81; 5 W. R., 4; 24 W. R.,

We have considered the finding of the Deputy Magistr upon this point in his final judgment, and we are of opinion t it is not sufficient to give him jurisdiction under section 530. seems to us that what he says is, that it is probable that a bre of the peace will occur if a proceeding under section 530 be taken. This finding would not give him jurisdiction.

We therefore set aside his order and make the Rule absolu

[CIVIL APPELLATE JURISDICTION.]

GOLAM ALI CHOWDHRY, (DEFENDANT) ..... APPELLANT;

AND

KALI KRISHNA THAKOOR, (PLAINTIFF) ..... RESPONDENT.

1881.
May 10*th.*

No. 219 of 1879.

Accretions to under-tenures, Assessment of rent in respect of—Reg. XI of 1825, *section* 4 *cl.* (1)—*Parent tenure—Agreement—Usage—Act VII* (*B. C.*) *of* 1879, *section* 7.

The rent of lands formed by accretions which under section 4, cl (1) of Regulation XI of 1825 are to be considered increment to a particular tenure is to be assessed with reference to the terms and conditions under which the parent tenure is held.

Per FIELD, *J.*:—The words "justly liable" in section 4, cl. (1) of Regulation XI of 1825, indicate an intention on the part of the Legislature that the rent payable for an alluvial increment shall be settled with reference to the circumstances of each particular case, regard being had to the agreement between the parties in respect of the original tenure, where there is such an agreement, and where there is no such agreement, to any usage proved to be applicable to such tenure.

APPEAL from a decree passed by the Subordinate Judge of Faridpur, dated the 23rd September 1878.

The plaintiff in this suit sought to recover arrears of rent for the year 1282 of a howla held by the defendant under the plaintiff in Chur Panchkati Purgunnah Edilpur, belonging to the plaintiff's putni.

On the 4th Bhadro 1260 the defendant executed a kabuliut in which the boundaries of the howla were given, and the quantity of land after deduction of *rukba* was stated to be 3 drones 8 kanis, the amount assessed being Rs. 280, at the rate of Rs. 5 per kani from 1264, lower rates being assessed for the previous years.

It was stipulated in the kabuliut that the land within the boundaries given should be measured after Pous 1261 on 15 days' notice to the defendant, and that all land found in excess of the

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Judgment.

area stated in the kabuliut should be assessed at the rate of Rs per kani.

Since the execution of the kabuliut lands had accreted to t howla by the receding of the river on the south and west.

The plaintiff alleged that due notice was given to the defend for measurement in Aughran 1281, and that as the defendant not appear, the measurement was proceeded with in his absence, t the total quantity of land after deduction of *rukba* was found to 7 drones 9 kanis. It was further alleged that the defendant in possession of 20 drones 2 kanis in addition, as accretion to howla.

The present suit was to recover rent at the rate of Rs. 5 kani from the land within the boundaries, and at rates varying w the nature and quality of the land for the land outside the bo daries.

The main question in the suit was, at what rate, or on w principle the plaintiff was entitled to rent for the lands outside boundaries fixed in the kabuliut.

It was further stipulated that culturable lands in excess sh be held rent-free for two years from the date of their being brou under cultivation.

The Subordinate Judge held that the rate of rent payable respect of the accretions was not necessarily that payable in resp of the parent tenure, but the pergunnah rate. He gave the pl tiff a decree accordingly.

The defendant appealed to the High Court.

Branson, W. M. Dass, Baboo *Chunder Madhub Ghose* a Baboo *Rash Behary Ghose,* for the Appellant.

Paul (Ad. Gen.), Baboo *Kali Mohun Dass* and Baboo *K Sukha Ghose,* for the Respondent.

The following judgments were delivered by the High Co (1):—

PONTIFEX, *J.*

PONTIFEX, *J.*:—I am of opinion that the accretion wh under Regulation XI of 1825 section 4 cl. 1, must be considere increment to the defendant's tenure, should be governed by the te

(1) PONTIFEX and FIELD, *JJ.*

d conditions applicable to the parent tenure as provided in the buliut under which such parent tenure is held.

The defendant having admitted his liability to pay some rent, e question to be decided is, what construction should be placed the words "increase of rent to which he may be justly liable" ntained in that Regulation.

The use of the word "increase" seems to shew that consideration is to be given to the rent reserved on the parent tenure. rent was assessable without reference to the rent reserved on e parent tenure, then I should have expected it to have been exessed as follows: "the accretion shall not be exempt from the yment of rent which may justly be assessed upon it." Supposing perpetual tenure had been created at a pepper-corn rent without y *salami* or bonus being taken, the holder of such tenure would effect be an absolute proprietor so far as the zemindar was ncerned, and, as absolute proprietor, would in my opinion be as solutely entitled to any accretion.

Supposing on the other hand that a perpetual tenure had been ated at a rent less than a rack or fair holding rent, and that a *lami* was taken on its creation. It might be right, if the cumstances of the lease permitted it, to take such *salami* into nsideration when assessing the rent upon any accretion.

But that is not the present case.

In the kabuliut under which the defendant holds, it seems to e that the cost and trouble of reclamation were intended to be ecouped by the tenant's privilege to hold rent-free for 2 years after he land first came under culture, as to any land taken into cultiation subsequently to the lease; and as to the lands specially eferred to in the kabuliut as then under cultivation, by the reseration for the first 3 years of a smaller rent than the final rent of Rs. 5. And apart from evidence to the contrary, I must consider hat the final rent of Rs. 5 was at the date of the kabuliut considered as a fair holding or rack-rent after the expenses of reclamation had been recouped.

It may be true that by reason of general improvement and rogress a fair holding rent at the present day would be more, and rhaps greatly more, than Rs. 5. But there is nothing to show at Rs. 5 was not a fair rent in 1261. And it must be remembered

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Judgment.

PONTIFEX, J.

that though the accretion may have formed only lately, the tena right to it under the Regulation accrued in 1261; and if it immediately thereafter come into existence a perpetual rent that date would have been assessed upon it. Why should zemindar's position be improved and that of the tenant deterior merely according to the date of the accretion coming into existen

I think, therefore, that the new accretion, or so much of has admittedly been in cultivation for a considerable period, sh be assessed at the fair holding rent of Rs. 5 as established in 1

If the plaintiff's contention was correct that the rent of accretion should be assessed at the rate prevailing in the pergun the defendant would get no greater benefit under the Regul than a stranger! but in my opinion it was intended that he sh have all the benefit of his already assured position.

It seems to me that a Court would have extreme diffic in arriving at any rent intermediate to the pergunnah rate and rent reserved on the present tenure.

If any intermediate rent was now adjudged, the zemi might on the same principle insist at some future time, tha would be liable to enhancement. But this would be contrar the conditions governing the parent tenure. And if the accre happened to be very large in extent in comparison with the of the parent tenure, (and in this case the plaintiff claims that i more than three times as large as the parent tenure) the valu the latter might almost vanish in consequence of the high assessed upon its offspring. In other words the offspring mi swallow up its parent.

If on the other hand the zemindar could not insist on fut enhancement, it is difficult to see on what principle he can claim a higher rate of rent than that reserved on the parent ten

I think therefore the accretion should be assessed at the s rate as the parent tenure; and this renders it unnecessary for to decide within what limits the parent tenure and the accre respectively lie. But I agree with the Subordinate Judge that report of the Amin in this case is not reliable, partly for the rea stated by the Subordinate Judge and partly because the rea stated by the Amin for fixing the southern boundary when places it, seem to me insufficient and inconclusive. I also a with the Subordinate Judge that if pergunnah rates were asses

n the accretion, there is no sufficient evidence of what such rate ould be. It may possibly be that if Government were to assess a igher proportionate revenue on these accretions than is borne by ie parent tenure, the plaintiff might have an equity to ask for ntribution in that respect from the defendant. But that case as not yet arisen and we are unable to deal with it, as at present revenue has been assessed by Government on these accretions. I ink that question should be left open till the Government assesses ie accretions.

The learned Advocate General for the plaintiffs placed some liance on the remarks of the Judicial Committee in the former it between the parties in which it was decided that the plaintiffs are not entitled to possession of these accretions. Those remarks ere as follows:—"The defendant was a middleman, and not a ryot, having a right of occupancy within the meaning of section 17 of Act X of 1859, or to enhancement under that section. If liable to enhancement at all, he could only be enhanced according to the pergunnah rate of the rents payable by similar holders."

The observations are somewhat ambiguous, but it is sufficient o say that they were not intended to settle the question and were nade apparently without the question having been really argued.

According to our decision the defendant's appeal fails in its nain objection to the decision of the Subordinate Judge. And I m also of opinion that it fails with respect to the manner in which he howladari rukba should be calculated, the decision of the Subordinate Judge in this respect being correct.

In only one point is the defendant entitled to succeed in is appeal. The Subordinate Judge says in his judgment:—

"The defendant claims a further deduction of 202 bighas which have been found by the Amin to be of the description called *helli* and *ohali*; but as this land would shortly be fit for cultivation, it cannot be exempted from assessment."

But I think that in accordance with the terms governing the rent tenure, rent would not become payable until 2 years after e land is taken into cultivation.

We have been informed by the plaintiff's advisers that this has en altered on review, but if it has not, the defendant's appeal will

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FIELD, J.

succeed in that respect. In other respects it fails. The plaintiff's appeal fails in all respects. Under the circumstances I think the parties ought to bear their own costs in this Court.

FIELD, *J.*:—I concur in the judgment which has just been delivered by my learned brother. Upon the essential question to be decided in this case I desire to make a few observations. The question really is this—At what rate is rent to be assessed on an alluvial increment to an under tenure? In order to the decision of this question in this particular case there are three points which will be well to notice. In the first place, the rent on the original howla is a fixed rent, not capable of enhancement. This has been settled as the result of previous litigation between the same parties. In the second place, the alluvial increment is admittedly liable to assessment of rent; and there is now no contention before us that the landlord is not entitled to receive additional rent for the additional land added to the under-tenure. In the third place, the under-tenure was created on the 4th Bhadro 1260, that is, on the 19th August 1854, and therefore there is no question of the applicability of section 57 of Regulation VIII of 1793, which applies to talooks or tenures in existence at the time of the permanent settlement. The ground being thus cleared by the disposal of these preliminary points, the question to be decided further resolves itself into this: whether the rent on the alluvial increment is to be assessed in proportion to, or upon the same principle as, the rent payable upon the *asil* or original under-tenure, or is to be assessed according to the rates payable in the vicinity for similar under-tenures or howlas, and without regard to the rent payable upon the *asil* or original under-tenure. Now, the words of Regulation XI of 1825 section 4 cl. 1 are these:—"When "land may be gained by gradual accession, whether from the recess "of a river or of the sea, it shall be considered an increment to the "tenure of the person to whose land or estate it is thus annexed." What is the meaning of the term tenure in this connection? Tenure is usually regarded as a mode of holding property as, for instance, in the expressions, "tenure by grand serjeanty", "tenure hold tenure", "feudal tenure", "tenure in burgage", "tenure coinage" and it is impossible to disconnect the meaning of the

"tenure" in any particular context from the ordinary incidents subject to which the particlar tenure is held. Then again, the word "tenure" is used not only of the mode in which property is held, but also of the land itself which forms the subject of the tenure. The very clause of the Regulation which we have to construe in this case furnishes an example of this double meaning of the term "tenure," which is used in the first sense in the passage "it shall be "considered an increment to the tenure of the person to whose land "or estate it is thus annexed." And in the second sense in the passage "provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure &c." Looking at the whole clause of the Regulation, I think the reasonable construction to be put upon the words "land ... gained by gradual accession.....shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed" is that the incidents of the original tenure attach to the increment. We have then immediately after these words a double proviso. The first proviso is concerned with the assessment of Government revenue. As to this, I shall have something to say hereafter. The second proviso is this: "Nor if annexed to a subordinate tenure held "under a superior landholder, shall the under-tenant, whether a "*khoodkhast* ryot holding a *mourosi istemari* tenure at a fixed rate "of rent per bigha, or any other description of under-tenant liable "by his engagements, or by established usage, to an increase of "rent for the land annexed to his tenure by alluvion, be considered "exempt from the payment of any increase of rent to which he may "be justly liable." It appears to me that the words "payment of any increase of rent" have a certain reference to the rent payable on the original tenure. Then as to the words:—"may be justly liable," it is important to bear in mind that when Regulation XI of 1825 was passed, the Legislature had not laid down any rules for the enhancement of rent or the assessment of land with rent. We know from State papers of the period of the Permanent Settlement and the period subsequent thereto that this was done designedly, as Government wished to avoid the appearance of interfering too much between the newly-created proprietors and the ryots, thinking moreover that the relations between them would be gradually settled by contract and by the proof of usages and customs in the

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FIELD, *J.*

Courts of justice. Thus we have in Regulation VII of 17 section 15 cl. 8 a provision to the following effect: "The Cou "of justice will determine the rights of every description of la "holder and tenant when regularly brought before them, whet "the same be ascertainable by written engagements or defined by "laws and Regulations or depend upon general or local usage wh "may be proved to have existed from time immemorial." It t appears to have been the intention of the Legislature to leave th questions of assessment and enhancement of rent to be settled by a tual agreement or local usage. This will in all probability expl the fact that the Legislature did not in cl. 1 of section 4 of Re lation XI of 1825 lay down any more precise rule for determining rent to be paid for land forming an alluvial increment to an un tenure than that contained in the words "increase of rent to wh he may be justly liable." These words "justly liable" appea me to have a certain reference to the principle upon which the may have been assessed upon the original tenure. For exam rent is in many cases made payable as a lump sum for a given a In other cases, it is assessed according to a classification of the l In the case of a *jungle boori howla*, or lease of waste land wh must be reclaimed before it is fit for cultivation, it is usual to l considerable area of land for a certain lump sum as rent. In case of land wholly or partly brought under cultivation, it is unusual to assess the rent with reference to the different classe land and the different crops which the land is capable of produc These are well-known usages of the country, and it appears to that the words "justly liable" indicate an intention on the par the Legislature that the rent payable for the alluvial increm should be settled with reference to the circumstances of each pa cular case, regard being had to the agreement of the partie respect of the original tenure where there is such an agreeme and, where there is no such agreement, to any usage proved t applicable to such tenure.

Then as to the proviso which has reference to the assess of Government revenue and the argument which has been dressed to us on this point, it may be observed that when Re lation XI of 1825 was passed, there was a previous Regulatio force, that is, Regulation II of 1819, which provided fo

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Judgment.

FIELD, J.

assessment of Government revenue upon alluvial increments to estates. Clause 1 section 3 of that Regulation enacted as follows: "All lands which, at the period of the decennial settlement, were "not included within the limits of any perguunah, mouzah or "other division of estates for which a settlement was concluded "with the owners, not being lands for which a distinct settlement "may have been made since the period above referred to, nor lands "held free of assessment under a valid and legal title of the nature "specified in Regulations XIX and XXXVII of 1793 and in the "corresponding Regulations subsequently enacted, are, and shall be "considered liable to assessment in the same manner as other "unsettled mehals, and the revenue assessed on all such lands, "whether exceeding one hundred bighas or otherwise, shall belong "to Government." The second clause of the same section further provides that "the foregoing principles shall be deemed applicable "not only to tracts of land, such as are described to have been "brought under cultivation in the Soonderbuns, but to all churs "and islands formed since the period of the decennial settlement "and generally to all lands gained by alluvion or dereliction since "that period, whether from an introcession of the sea, an alteration "in the course of rivers or the gradual accession of soil on their "banks." That Regulation therefore, distinctly laid down the principle that alluvial increments to permanently settled estates are liable to assessment of Government revenue: but it did not enunciate the principle upon which the Government revenue is to be assessed. That is a matter provided for by the executive orders of Government or of the Board of Revenue: and it is further a matter over which the Civil Courts have no jurisdiction. It may, however, be assumed for the purpose of deciding this case that the revenue to be paid to Government upon the alluvial increment is assessable without reference to the amount of revenue payable upon the original estate. If then, it may be argued, rent should be assessed on the alluvial increment according to the rate payable upon the *asil* or original under-tenure, and if this rent should be so small that it will not suffice to meet the Government revenue which the settlement officers may assess upon the same alluvial increment regarded as an increment to the revenue paying estate, is it not unjust to the zemindar, that he will thus be forced to hold this addition to his

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FIELD, J.

estate at a loss? If this question is asked in the interests of ernment, the answer is a very simple one, *viz.*, that if by rea the rent, payable on the alluvial increment, being less tha Government revenue, the alluvial addition, or the original with the alluvial addition (where both are included in a singl engagement with Government) becomes unprofitable to the z dar, the result will be a Government sale, and the avoidance under-tenure, as the result thereof, whereupon the unencum estate will, in the hands of a purchaser at such sale, presu yield sufficient to pay the revenue and afford a reasonable But Government is no party to this case, and therefore it is cessary to decide this question so far as Government is conc Then so far as regards the zemindar, the case contemplated b argument has not yet arisen, for it has been admitted at this ing that Government has not yet assessed any revenue upo alluvial increment. The fact of Government revenue having assessed upon the alluvial increment is therefore not a nece element for consideration in the case which we have to decide. it may be important to point out that the new case whic arise when revenue is assessed on the alluvial increment is pro for by an Act of the Bengal Council, namely, Act VIII of Under the provisions of section 7 of this Act the rent record demandable from an under-tenant in an estate under settleme to be determined by the settlement officer in accordance certain rules therein prescribed. One of the questions which settlement officer has to determine in order to settle this r this, whether the under-tenure is binding as against the Go ment or not: And upon the decision of this question will de the amount of rent which is to be recorded as demandable fro under-tenant. Under section 10 of the same Act every u tenant is liable to pay the rent so recorded as demandable him, unless he can prove in a civil suit that such rent has not assessed in accordance with the provisions of the Act: and section 11 if the Court modifies or sets aside such rent, it proceed to determine the rent payable by the under-tenant in ac ance with the provisions of the same Act. The direct obj these provisions is to secure a reasonable proportion between revenue payable by the zemindars to Government and the

e by the under-tenants to the zemindar. It will thus appear t may possibly be open to the parties at any future time he Government proceeds to settle the revenue payable upon luvial increment to re-open the question of the rent to be respect of such increment, and to have such rent re-assessed the provisions of section 7 of the Bengal Act with advertence amount of Government revenue made payable upon such l increment. It appears to have been the intention of this enable the settlement officer to re-adjust the rent of under- when such rent had been previously fixed at an amount ient to meet the revenue subsequently assessed. Whether egislature has used language sufficiently to effectuate this ion and whether this particular under-tenure falls within the ion of the Act, it is no part of our duty on the present occa- o decide. I will only observe that our decision proceeding as upon the present circumstances of the case, *i. e.*, while Gov- nt revenue has not been assessed, does not anticipate the nent of revenue and does not decide whether or not such nent will have the effect of making the defendant "justly for any other or higher rent. With reference to the provi- f the Regulation and apart from the question of Government e I have myself no doubt that the alluvial increment ought assessed with rent on the same principle as rent is, by the ct of the parties payable upon the original or *asil* under-

[CIVIL APPELLATE JURISDICTION.]

1881. *May 10th.*

No. 917 of 1879.

SHYAMI SUNDURI, (PLAINTIFF) ..... APPELLANT

AND

HURO SUNDURI AND OTHERS, (DEFENDANTS) ... RESPONDE

Court Fees Act, VII of 1870, *section* 12—*Insufficient Stamp—Va tion of suit—Civil Procedure Code, Act X of* 1877, *section* 578.

Notwithstanding the provisions of section 578 of the Cod Civil Procedure, an Appellate Court is competent under section of the Court Fees Act, VII of 1870, to dismiss the plaintiff's when it has been brought upon an insufficient stamp, and plaintiff does not, when so directed, pay the amount of the deficie although no objection as to the amount of the Stamp shall h been taken in the Court below.

APPEAL from a decree passed by the Officiating Judge Tipperah, dated the 6th January 1879 reversing a decree pas by the Second Subordinate Judge of Tipperah, dated the 1 May 1877.

The plaintiff brought this suit to obtain from the defenda the mote nikas or general adjustment papers showing the inco and expenditure, the *rokur* and *jama-khurch* papers, &c., &c., the *Mahajani* years 1279 and 1280 in respect of ijmali arutd business carried on in the bazar of Bhogobangunj within the jur diction of Naraingunge in the names of Chandi Churn Dey, husband and the late Goloke Chunder Das the husband of the and 2nd defendants.

In the plaint it was alleged that the "presumed loss for rendering over the account papers sought for may amount Rs. 4,000.

The Court fee paid in respect of the suit was Rs. 10. As this the following allegation was made in the plaint: "I bring th suit in this Court paying Rs 10 as stamp duty, and I shall brin a suit afterwards in the proper Court after I shall have receiv the nikas and the other account papers claimed for the capital a

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profits in proportion to the share which my late husband had in the *karbar* in question."

The Subordinate Judge, in whose Court the suit was instituted, made a decree that the defendants Nos. 1 and 2 and defendant No. 3 who was a gomastah employed in the business, should deliver up the nikas and other papers claimed for the *Mahajani* years of of 1279 to the plaintiff.

The District Judge was of opinion that the suit had been instituted upon an insufficient Court fee stamp.

In his judgment, he said, "The error consisted in allowing the plaintiff to split up her claim into two portions a provisional one for accounts, to be supplemented at a later time by a further suit for a sum of money to be ascertained to be due. In the interests of the revenue I am obliged by section 12 of Act VIII of 1870 to require the plaintiff to supplement her defective Court Fee. She is required to furnish this in respect of Rs. 4,000—Rs. 130 (the amount covered by the Rs. 10 stamp) = Rs. 3,870. A week's time is allowed for this purpose. * * If the plaintiff respondent fail to supplement the defective duty then the decision of the Subordinate Judge will have to be set aside for want of jurisdiction."

The plaintiff failed to comply with the order of the District Judge and the suit was dismissed.

Against the decree of the District Judge this second appeal has been preferred.

Baboo *Sreenath Doss* and Moonshee *Serajul Islam*, for the Appellant.

Branson and Baboo *Bykunt Nath Doss*, for the Respondents.

The judgment of the High Court (1) was as follows:—

The plaintiff as a member of a partnership concern brings this suit against her co-partners and certain persons who have acted as servants of the concern to obtain from them certain account papers which she specifies. She estimates the loss arising from the defendants not rendering these accounts to her at Rs. 4,000, but she values the suit at Rs. 10 only as she seeks to obtain a simple declaratory decree and intimates her intention of bringing

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a further suit for account after she has received the account papers which she requires.

The first Court framed certain issues, none of which had reference to the valuation of the suit, and finally gave a partial decree in favour of the plaintiff. Against this judgment, the defendants appealed and their memorandum of appeal was engrossed on a stamp of like valuation. The District Judge on taking up the appeal was of opinion that the plaint bears an inadequate stamp, and under the proviso upon the 1st clause of section 12 of the Court Fees Act, VII of 1870, called upon the plaintiff to make good the stamp due upon the full amount of her claim, *viz.*, Rs. 4,000.

As she failed to do this within the required time, the District Judge set aside the decision of the Subordinate Judge "as void for want of jurisdiction." Against this order a special appeal has been preferred to this Court, and the ground taken is that the District Judge has erred in law in the construction which he put upon the 12th section of the Court Fees Act, in other words that as no question relating to valuation for the purpose of determining the amount of fee chargeable on the plaint was decided by the Court of first instance, the Appellate Court was not competent under the 2nd clause of section 12 to raise the point of its own motion and require an additional fee to be paid. In support of this contention the case of *Kala Chand Sen* v. *Anund Kristo Bose*, 22 W. R., 433, is referred to, in which in a case presenting somewhat similar circumstances a Division Bench of this Court expressed the opinion that "the object of the proviso (section 12) was no doubt "to enable the Appellate Court to interfere for the protection of "the revenue in a case where a question of that sort might be "raised and improperly decided. In the present case even if it "be assumed that the stamp originally paid was, what it really was "not, insufficient there was no question raised in the Court of first "instance. It seems to us therefore that the Subordinate Judge "ought not to have allowed to be raised a question which neither "had been raised in the first Court where, if necessary the amount "of additional stamp might have been at once paid, nor in the "grounds of appeal."

We observe that in that case the Court held that the stamp originally paid was not insufficient, and therefore this expression of

inion relative to section 12 of the Court Fees Act taking the form an *obiter dictum* cannot be regarded as an authoritative declaration of the law.

It appears to us that the words "Every question relating to valuation on a plaint shall be decided by the Court in which such plaint is filed &c." do not carry with them the meaning that distinct question or issue relating to valuation must be raised, d a formal decision thereon passed by the Court of first instance fore a Court of Appeal can interfere. The law, section 54 of the de of Civil Procedure, directs that a plaint shall be rejected if the lief sought is undervalued, and the plaintiff on being required by e Court to correct the valuation within a time to be fixed by the urt, fails to do so, or if the relief sought is properly valued, but e plaint is written upon paper insufficiently stamped and the aintiff, on being required by the Court to supply the requisite mp paper within a time to be fixed by the Court, fails to do so.

No plaint can be accepted and registered until these preliminary questions of valuation and sufficiency of stamp have been etermined by the Court, and therefore it seems to us that it would straining the language of section 12 to say that the question lating to valuation therein mentioned has only reference to a estion raised as a distinct issue and decided by the Court of first stance in the presence of and as between the parties to the suit.

If then the Court of Appeal should, as in the case now before consider that the plaint has been admitted "to the detriment the revenue" the law declares that it "shall require the party by whom such fee has been paid to pay as much additional fee as would have been payable had the question been rightly decided," at is, in the present case, that the plaintiff respondent shall pay e additional fee on his plaint. If he does not do so "the provisions of section 10, para. ii, shall apply" or "the suit" (*i. e.* the peal) "shall be stayed until the additional fee has been paid. f the additional fee is not paid within such time as the Court hall fix, the suit shall be dismissed." From this we understand t unless the plaintiff submits to the order of the superior Court, loses any advantage that he may have obtained on his improdly stamped plaint. This is exactly what the District Judge done in the present case, though the terms of his order that

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the suit is "void for want of jurisdiction" are not exactly in accordance with law. We understand him however to mean that as the plaint was not properly admitted, the Lower Court could not try the suit and that therefore it must be dismissed on that ground and not on its merits.

But it is next contended that an Appellate Court could not consider this matter because section 578 of the Code of Civil Procedure declares that "no decree shall be reversed, &c. on account of "any error, defect or irregularity not affecting the merits of the "case or the jurisdiction of the Court." This provision is a re-enactment of section 350 of Act VIII of 1859. But while the Act of 1859 was in force, the Court Fees Act of 1870 was passed, and section 12 of the Act just quoted clearly made it the duty of a superior or Appellate Court to take action for the protection of the revenue, and to dismiss the suit if the party in default did not pay in the deficient Court-fee.

That was clearly an exception to section 350 of Act VIII of 1859. The Code of 1877 has merely followed in the steps of the Act of 1859; section 12 of the Court Fees' Act is still in force and must be read with section 578 of Act X of 1877, in the same manner as it was read with section 350 of Act VIII of 1859.

We are therefore of opinion that the judgment of the Court below is right, and we dismiss this special appeal with costs.

[SMALL CAUSE COURT REFERENCE.]

SHEKH AUBAR..... PLAINTIFF;

AND

SHEKH KHAN AND ANOTHER ..... DEFENDANTS.

1881.
May 3rd.

No. 5 of 1881.

Evidence of consideration for promissory note aliunde—Lost promissary note—Account stated verbally, Suit upon—Limitation Act, XV of 1877, Schedule II, Art. 64.

The plaintiffs having a claim against the defendants for the value of a share in a partnership business, it was verbally agreed that Rs. 250 should be taken as the value of the share and the sum of Rs. 25 was given to the plaintiff as part payment, and in return for a promissory note for the balance payable two months from the date, the plaintiff made over to the defendant a receipt for the same amount. In a suit instituted more than three years after the date of the note, the plaintiff sought to give secondary evidence of the note which had in the meantime been lost. The original note was insufficently stamped.

Held, that the note having been insufficiently stamped, secondary evidence of its contents was inadmissible.

Held, further, that the plaintiff could not recover the money due thereunder as upon an account stated in as much as (1) the original claim upon such an account had been converted into a claim upon the note, and (2) the claim, if any, upon such an account stated was barred by limitation.

Per GARTH, *C. J.*:—When a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for the payment of the money, the creditor, if the bill or note is not paid at maturity, may always as a rule sue for the consideration, provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person. But when the original cause of action in the bill or note itself does not exist independently of it, in such a case the bill or note is the only contract between the parties, and if for

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want of a proper stamp or other reason the note is not admissible the creditor must lose his money.

Golap Chand Marwaree v. *Thakooranee Mohakoom Koonr* I. L. R., 3 Cal., 314 explained.

Quære :—As to the period of limitation in the cause of a account stated verbally.

REFERENCE submitted under section 617 of Act X of 1877 f the opinion of the High Court, by the Judge of the Small Ca Court at Dacca.

The Reference was in the following terms :—

"This is a suit to recover Rs. 225 on a Likhan, dated the 2 Aughran 1284, payable within two months of that date, under wh the plaintiff is said to have deposited Rs. 225 with the defend The cause of action is expressly stated to have arisen two mon after that date. Otherwise the suit would be barred by limitatio it was instituted on the 7th February or 26th Magh last (1287), more than 3 years after date of the so called deposit. The Lik was not filed with the plaint, it being stated that it was on record of a criminal prosecution which the plaintiff had previou instituted against defendant No. 1 for a criminal breach of trust

"At the trial it was alleged that the document was sub quently taken out of the criminal record and handed over plaintiff's Vakeel's mohurrer who accidentally lost it. The plain therefore filed an unattested copy of the Likhan which he kept and attempted to prove the contents by secondary evide A translation of the copy is herewith submitted. It will be s at once that the document was a promissory note within the defini (25) in section 3 of Act XVIII of 1869 which governed the c That being so it required a stamp duty of 3 annas according to 2 of Schedule 1 of that Act, being payable otherwise than on dem It is, however, admitted on both sides that there was an adhe stamp of one anna only affixed on the document. That being case the first question that arises, is whether the document admissible in evidence and if not whether secondary evidence the passing of consideration is admissible. The law was an very clear on the point. Under section 28 of Act XVIII of 18 was not possible to affix or impress fresh stamp or stamps on

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promissory note as it did not come within the provisions of sections 1 and 26, and section 18 made it totally ineffectual as evidence creating an obligation" Section 34 of the current law (Act I of 1879) contains the same provisions. The late Chief Justice ruled the same in *Audhur Chunder Roy Chowdhry* v. *Madhub Chandra Ghose*, 21 W. R., 1. In the case of *Prosunno Nath Lahiree* v. *Tripoora Sunduree Dabee*, 24 W. R., 88, 89, turning upon an unstamped Roka or Likhan held to be a promissory note, MACPHERSON, Offg. *C. J.* remarked :—"It appears to us that the contract (if any) which was made between these parties was reduced to writing, and that the only cause of action which the plaintiff had against the defendant arose out of the contract embodied in this unstamped Roka or promissory note. That being so, no oral evidence is admissible to prove the terms of the contract, and the Lower Courts were wrong in admitting such evidence. And they ought not to have received the instrument itself as evidence even supposing it to be no forgery. Of course if it had simply been an instrument bearing no stamp, and was one which the Court had power to receive under section 20 and the Court had received the penalty and the stamp duty, being satisfied that the omission to stamp it originally did not arise from an intention to evade the payment of the proper duty, in such a case, we should have had nothing to say on the subject." Further on, his Lordship said : "For another reason also this instrument is not one which the Court had power to receive under section 20 of Act XVIII of 1869, even if there had originally been no intention to evade the payment of the proper duty. Being in the nature of a promissory note, it is clear from sections 19 and 28 that the document could not be received under section 20."

"According to this Ruling therefore no secondary evidence of the contents of the instrument or passing of the consideration can be received by me. In the case of *Golap Chand Murwaree* v. *Thakoorani Mohakoom Kooaree*, I. L. R., 3 Cal., 314, however, KENNEDY, *J.* held, according to *Farr* v. *Price*, 1 East, 55, "that an unstamped promissory note does not prevent the lender of money from recovering on the original consideration if the pleadings are properly framed for that purpose." In this case the case of *Audhur Chunder Roy Chowdhry* above alluded to, was adverted to and distinguished. It does not appear that the other case and the ruling

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of MACPHERSON, Offg. *C. J.* was brought to the notice of the Justices in the last case mentioned, and that case appears to be in direct conflict with this case. The case of *Farr* v. *Price* is not open to me nor am I certain whether the case of an endorsee or *bonâ fide* purchaser of a promissory note for value (for *Golap Chand Marwaree's* case was a case by an endorsee) is different from that of an original drawer of a note. I am not aware whether the ruling in *Farr* v. *Price* was come to in the face of such stringent provisions in the English Stamp law as were and are the provisions of the Indian Law. I, however, see from other cases before me that one effect of the case of *Golap Chand Marwaree* will be that promissory notes will not be stamped at all. The point is so important and of so constant occurrence that I feel it my duty to refer the matter to the High Court for an authoritative decision by reference to a Full Bench, if necessary, as there is conflict of rulings.

"The first question for reference therefore is:—whether the plaintiff in this case is entitled to recover the amount merely on proving that the original consideration passed irrespective of the Roka or promissory note given in acknowledgment thereof?

"Then arises another question, namely, when did the cause of action arise in this case and whether the suit was not barred by limitation, supposing that *Golap Chand Marwaree's* case governed it? If it was a case of actual deposit of money and 3 years' limitation applied to it, and if the time was to be computed from the date of deposit, it is perfectly clear that the suit, being brought nearly 2 months after 3 years of the date of the Likhan, is barred by limitation. The case of *Golap Chand Marwaree* does not throw any light on this point, as it merely laid down that "the existence of an unstamped promissory note does not prevent the lender of money from recovering on the original consideration, if the pleadings are properly framed for the purpose." It does not go to the length of laying down that the original consideration is to be considered to have fallen due after the time stipulated for in that unstamped promissory note, or in other words that a term in a written contract inadmissible in evidence is to be coupled with the consideration. According to the case of *Prosunno Nath Lahiree* no secondary evidence of the contents of the promissory note is admissible. It would appear therefore that whatever might be the period of limi-

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tation governing this case, the plaintiff was bound to sue within that period from the date of the passing of the consideration. Now Art. 60 of Schedule II of the Limitation Act provides 3 years from the time when the demand is made "for money deposited under an agreement that it shall be payable on demand." But there was no such agreement in this case, and there is no specific provision in the law as for deposits either payable after an expressly fixed period or without any contingency or time fixed for payment at all. A distinction being made throughout the schedule between "movable property" and money, art. 145 cannot apply to this case. Art. 115 seems to be the only provision applicable to this case while the similar provision of Article 116 has been held to apply to registered bond debts.

"But this is not a case of actual deposit at all. From the evidence on both sides, it appears that the plaintiff had instituted a suit against his brother's widow Sandal Bibi for a share of assets left by the brother on his death. That suit was compromised for a sum of Rs. 250 of which Rs. 25 was paid then and there. The remaining Rs. 225 could not be raised without interfering with a karbar which the brother left and which the 2nd defendant, the widow's brother managed on her behalf in co-partnership with the 1st defendant. According to their notions of legal propriety in order to make the compromise valid, the plaintiff gave a registered receipt to the widow (Sandal Bibi) on 26th Augrahan 1284, in full acquittance, and the defendant agreed by this promissory note or likhan to pay the plaintiff the remaining sum of Rs. 225 within 2 months, the private understanding being that the sum would be paid gradually from the proceeds of the karbar. This suit has been brought after such a lapse of time because defendant No. 1 who left the karbar about a year half ago, has fallen out with the widow Sandal Bibi the sister-in-law of the plaintiff.

"It is therefore clear that though there was valid consideration for the likhan, and though it is called an Amanutnamah or instrument of deposit there was no actual deposit at all. The essence of a deposit is that it is made at the request and for the convenience of the depositor or party plaintiff; whereas in case of a loan, it is made at the request and for the benefit of the borrower or the party defendant. Hence Sandal Bibi and the manager of her affairs,

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namely, the defendants being unable to meet the plaintiff's dem of Rs. 225 payable under the compromise, the defendants reques as it were, the plaintiff to lend them the sum and gave that document in acknowledgment thereof. It was there essentially a loan transaction and therefore Act XVIII w apply to it. I think that the general provision of Art. 115 meant to cover cases arising out of contract or convention registered, and that of Art. 120 in any other case including cont in writing registered.

In either view limitation of 3 years would apply to this and the time is to be computed from the date of the passing of consideration. So far therefore as I am at present advised, I t the suit is barred by limitation. But I am not aware how far case of *Farr* v. *Price* on which *Golap Chand Murwaree's* case is b goes as regards the date of the arising of the cause of action, am I very confident of the view I take as regards limitation therefore dismiss the suit on this second ground contingent the opinion of the High Court. The second point for refer is—What period of limitation is applicable to this case assu that the case of *Golap Chand Marwaree* applies to it, and what date that period is to be computed? There are other p such as the plea of payment which I reserve for the present.

Das, for the Plaintiff.

No one appeared for the Defendants.

The judgment of the High Court (1), which was as fo was delivered by—

GARTH, *C. J.*

GARTH, *C. J.*:—We have taken time to consider our judg in this case, not because we had any doubt as to the result of decision in the Lower Court being correct, but because several p and authorities have been dealt with there which appear to re same explanation.

In the first place we think it clear that the document in tion was not admissible in evidence. It was a copy of a lost missory note which was itself inadmissible, as being insuffici stamped, and the copy of course could not be received in evi any more than the original.

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Whether evidence of the consideration for the note was admissible, depends upon the circumstances under which the note was given; and it is upon this part of the case that we think the Judge in the Court below has not quite understood the meaning of the authorities to which he refers.

When a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim, the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may, always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. In such cases the note or bill is said to be taken by the creditor on account of the debt; and if it is not paid at maturity, the creditor may disregard the bill or note and sue for the original consideration. See *James* v. *Williams*, 13 M. and W., 828 and other cases mentioned in Addison on Contracts, 3rd ed., p. 1204. The cases cited in argument before us by Mr. Das from 10 Ad. and Ellis 616 and 3 Exch., 293 were of this nature.

But when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when in consideration of A depositing money with B, B contracts by a promissory note to repay it with interest at 6 months' date, here there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties; and if for want of a proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money. Of this nature were the cases referred to by the Judge of the Lower Court in 21 W. R., 1, and 24 W. R., 88. The case to which he refers decided by KENNEDY, *J.* apparently belongs to the former class; and in *Farr* v. *Price*, East, 55, all that Lord Kenyon ruled was, that if on the new trial the plaintiff could prove his claim under the common counts (that is to say, independently of the note,) he might recover. There is no doubt as to the principle of these authorities. The difficulty often is to ascertain as a matter of fact to which class any particular case belongs.

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It will be found that one very material and practical distin tion between the two classes of cases where the bill or note is l properly stamped and lost as it has been here, consists in this, th in the former class, namely, when the cause of action is compl before the bill or note is given, the *onus* of proving the bill or n is generally thrown upon the defendant; thus, suppose the pla tiff's claim is for goods sold, and he proves at the trial the sale the goods and the price. This constitutes his *primâ facie* c The defendant says, "Yes, but I gave you a promissory note the price of those goods." The defendant is then bound to pr the note, but he cannot do so, because it is lost and unstamped. the other hand, in the latter class of cases, where the cause of is inseparable from the giving of the bill or note, it is obvious, t the *onus* of proving the lost instrument must fall upon the plain and that he cannot make out a *primâ facie* case without proving

Now applying this principle to the present case, we underst the facts to be these. The plaintiff had a claim against the de dants for the value of a share in a partnership business; and it verbally agreed between them that in the settlement of that cl Rs. 250 should be taken as the value of the share which sum to be paid by the defendants to the plaintiffs. The defendants in fact give the plaintiff Rs. 25 in part payment of that sum; they were unable at that time to pay the rest. So far the tran tion appears to have consisted of a settlement of an open claim an agreed sum; and the plaintiff might have sued for that s as upon an account stated without regard to the promissory not

But then came the giving of the note, which the Lower C treats, and we think properly treats, as a sort of loan transact The plaintiff gave the defendant a receipt for the remaining Rs. in return for which the defendants gave the plaintiffs this promis note. It was therefore a loan of the Rs. 225 to the defend upon the terms contained in the promissory note, and as there no loan independently of the note, the note itself was the evidence of the transaction, and as it could not be proved for of a proper stamp the plaintiff could not recover upon it.

But then 2ndly, could the plaintiff recover the Rs. 22 upon the account stated? We think he could not, for two sons:

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1st. He had given the defendants a receipt for that sum llowing them to retain it upon the terms of the note; and he had us converted his original claim upon the account stated into a laim upon the note.

And 2ndly his claim upon the account stated, if he had any, as barred by limitation.

It was ingeniously suggested in argument on behalf of the laintiff, that as Art. 64 of Schedule II of the Limitation Act ays nothing in the 3rd column as to accounts stated by word of outh, that article must be considered as applicable only to accounts tated in writing; and that as no special period of limitation is escribed for suits upon accounts stated orally, the period of limitation r such suits would be 6 years. It is certainly difficult to under- and what the Legislature could have intended by this omission, t we think that giving a reasonable construction to Art. 64 e must consider, that the 2nd column means to fix three years as e period of limitation in all suits upon accounts stated. To escribe a limitation of three years in suits upon accounts stated writing, and 6 years in suits upon accounts stated orally, would an obvious absurdity.

It was further contended on behalf of the plaintiff, that as the promissory note the plaintiff gave the defendants two months' ne to pay the Rs. 225, limitation ought not to run till the expi- ion of that time. But the obvious answer to this is, that the omissory note is not proved; and that it cannot be used for extend- g the time for payment of the Rs. 225, any more than for any her purpose.

In the result therefore we find that the judgment of the Lower urt is correct; and though it is, no doubt, an extremely hard se upon the plaintiff, we think that his suit has been rightly missed.

Since this judgment was written, Mr. Das has drawn our tention to the case of the *Eastern Financial Association* v. *stangi Corsetji*, 3 Bom. H. C. R., 12, in which COUCH, *C. J.* o was sitting alone, apparently gave the plaintiffs an opportunity paying the additional duty and the penalty in the case of a omissory note payable after date. The plaintiffs, however, clined to pay the additional stamp; the attention of the learned

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Chief Justice does not appear to have been drawn to the provisions of the Stamp Act, and certainly, as far as we can see, the point was not argued.

We find, however, a decision in this Court by PHEAR and MORRIS, *JJ.* reported in the 13 B. L. R. app., 33, *Nandan Misser* v. *Chatterbati*, in which the precise point which arises here was argued, and in which those learned Judges held, that having regard to section 28 of the Stamp Act of 1869 a promissory note payable after date could not be stamped with an additional stamp. We find also, that Mr. Justice WILSON has decided the point in the same way, and we have not the least doubt of the correctness of that view.

As the point is a technical one, and as the merits of the case seem undoubtedly to be with the plaintiff, we make no order as to costs.

[CRIMINAL APPELLATE JURISDICTION.]

1881. *May 30th.*

No. 276 of 1881.

KHORSHED KAZI AND ANOTHER, ... APPELLANTS;

AND

EMPRESS ..... RESPONDENT.

Forged Document—Penal Code, Act XLV of 1880, *section* 471—*Jury, Charge to—Misdirection.*

Where the accused were charged under section 471 of the Penal Code with having, in a suit brought against them by the vendee of their sister to recover possession of certain property acquired by her by right of inheritance from her father, fraudulently and

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dishonestly used a forged document as genuine knowing or having reason to be believe it to be a forged document, it appeared that the accused were in possession of the property, and that the document in question purported to be a deed of gift from their father.

It was proved that the endorsement of registration which appeared in the document was a forgery.

In his charge to the Jury the Sessions Judge omitted to deal with the fact of the accused being in possession of the property. He also directed that, the registration endorsement having been proved to be a forgery, it was for the accused persons to establish the genuineness of the document.

Held, that it was not sufficient for the Jury merely to decide on the evidence whether the document was a forgery, and whether the accused knew it was a forgery when they used it, but it was further necessary for the Jury to decide whether the document had been used fraudulently and dishonestly.

Held also, that the Sessions Judge in omitting to deal with the fact of the possession of the accused, and in throwing the *onus* of proving the genuineness of the document upon them, had misdirected the Jury.

APPEAL from a conviction and sentence passed by the Sessions Judge of Hooghly.

The appellants were the sons of the late Shafuruddeen Kazi who also left him surviving a daughter Shurifunnessa, and a widow, the mother of these children. In a suit brought by one Buduruddin against the appellants to recover possession of the share of the landed property which devolved upon his vendor, the daughter of aforesaid Shufuruddin by right of inheritance, the appellant Dhunu Kazi produced a hiba-bil-iwaz, alleged to have been executed by his father on the 17th Falgoon 1260, corresponding with the 27th February 1854. This document was produced to show that the father made a gift of all his landed property to the sons. The document purported to bear an endorsement of registration No. 32 dated the 12th April 1854 by Golam Rusool, Kazi of pergunnah Jehanabad. The appellant Dhunu Kazi admitted the production of the document. He also alleged that he received it from his brother the other

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appellant who also admitted having sent it to his brother to be produced in Court in support of their defence, that their sister had no share in the land in dispute. The document was alleged to be a forgery; and the appellant Dhunu Kazi was charged under section 471 Indian Penal Code with having fraudulently or dishonestly used it in a judicial proceeding as genuine, knowing or having reason to believe it to be a forged document. The other appellant Khorshed was charged with having abetted that offence. The Sessions Judge of Hooghly in accordance with an unanimous verdict of the Jury found them guilty on these charges and sentenced them each to 5 years' rigorous imprisonment and 100 rupees fine. From the conviction and sentences the prisoners presented this appeal.

Baboo *Umbica Churn Bose*, and Baboo *Troylukho Nath Mitter*, for the Appellants.

Shurufuddeen and Baboo *Saligram Singh*, for the Crown.

The following judgments were delivered by the High Court (1):—

MITTER, *J.*

MITTER, *J.*:—(After stating the facts.) As the objection urged in appeal is that there are several material errors both of omission and commission in the Charge of the Sessions Judge to the Jury, I shall briefly state the substance of it.

The Sessions Judge first of all tells the Jury that it must be proved in the first instance that the document in question is forged; that then the Jury will have to decide whether the accused person knew it to be forged, and having this knowledge fraudulently and dishonestly used it as genuine; that the accused persons admit that they used it as genuine in the Civil suit, that therefore the questions which the Jury will have to consider are (1) "Is the document a forgery or not: and (2) Did the accused know it was a forgery when they used it as above."

Then the Judge gives a brief history of the case as proved in the evidence in the course of which he alludes to the fact that the Moonsiff in the Civil suit "held the hibba propounded to be a forgery and directed the criminal prosecution which has ended in this trial."

(1) MITTER and MACLEAN, *JJ.*

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MITTER, J.

The Judge further refers in detail to the evidence adduced by he prosecution to prove the registration endorsement upon the ocument to be a forgery. After placing that evidence before he Jury, the Judge continues as follows: "If my own opinion is f any use to you, I have no hesitation in stating that it seems) me to show as clearly as can be shown by such means that the ocument A was not really attested or registered by any official Cazi of Jehanabad and that thus so far as the certificates of such ttestation and registration go, these are forgeries."

Then further on, he says:—"It does not of course necessarily ollow that the document itself is a forgery because these certificates n it are forged; but it does follow in the nature of things that he document too should be regarded with suspicion, and that the learest evidence of its genuineness and authenticity should be required before it is accepted as genuine &c. * * * * * Primarily it would be for those who assert the genuineness of the document to prove this by the evidence of those attesting witnesses who are live still, as it is in evidence that some are."

Then he discusses the evidence of three witnesses for the prosecution examined to prove that certain signatures purporting to be those of the three of the attesting witnesses to the document are really not their signatures. He concludes his observations upon he testimony of these witnesses with the remark that "little or nothing against the document can be gathered from such evidence."

Then the Judge referring to the date of the death of the father f the accused says that there is some discrepancy in the evidence bearing upon that point. He also points out that the accused ave not adduced any evidence to prove the execution of the document or its existence at any time before this dispute arose. After referring to the two incompatible statements made by the accused horshed before himself and the Committing Officer respectively, ., that before the latter the accused said that he obtained document in question from his father, while before the Sessions urt his statement was, that he got it from his mother, the Judge ncludes as follows:—

"On the evidence you must decide whether or not you believe document A to be a forgery. If you find it to be a forged

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MITTER, J.

document, you must ask yourselves whether or not the accused must have known it to be a forged document. If you find they knew this, you should convict them, as they acknowledge the use of it."

I think that the objection taken before us against the Judge's Charge is well founded. It seems to me that the Judge was in error in stating to the Jury that the second question which they had to decide was "Did the accused know it was a forgery when they used it as above." This is not sufficient, because the prosecution in connection with this point must prove also that the use of the document was made by the accused "fraudulently" or "dishonestly" in the sense in which these two terms are used in the Penal Code. In order to prove this fact the prosecution must show that the accused had no reasonable ground for asserting their title to the land in dispute. The Judge has not at all alluded to this question. The factum of possession and the date of the death of the father of the accused persons are material points for consideration with reference to this question. If the sister of the accused after the death of the father had not been in the possession of her share of the land in dispute for more than 12 years, the accused would have good ground for asserting their title to it. The Judge has wholly omitted to deal with his part of the case, and the omission we think has materially prejudiced the appellants.

The Judge is further wrong in telling the Jury that the registration endorsement being proved to be a forgery, it was for the accused persons to establish the genuineness of the document. This is clearly wrong, it was for the prosecution to establish its forgery. The Judge says that some of the attesting witnesses are still alive. Under these circumstances the Judge ought to have told the Jury that it was the duty of the prosecuting Counsel to call them as witnesses.

The prosecution must also establish that the accused persons used the document fraudulently or dishonestly knowing or having reason to believe it to be forged. The Judge has not referred to the evidence bearing upon the question of knowledge or belief. We need hardly point out that the finding of the Moonsiff or the Judge in the Civil suit cannot be used as evidence in this case.

On the whole we are of opinion that the errors and omissions

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Judgment.

MACLEAN, *J.*

pointed out above have materially prejudiced the appellants. We therefore set aside their conviction and direct a re-trial.

MACLEAN, *J.* :—From the fact that the appellants were defendants in the Civil suit I presume that they were in possession of the land claimed by the purchaser from their sister, and this is materially in their favour, for being in possession, the impugned document would not be required for any purpose until their title was challenged. If the Jury believed that either of them received it from their father or even from their mother, it would be a fair question for them, the Jury, to consider whether either parent could have had any motive for forging it.

The Judge was wrong to say that it does not necessarily follow that the document itself is a forgery because the registration certificates are forgeries if he means to say that the forgery of these certificates is not an offence. In law the offence of forgery is complete if a part of a document is dishonestly made, so that the making of that part is intended to shew that the document was executed at a date when it was not really executed.

The Judge has also misdirected the Jury in telling them that the *onus* of proving the due execution of the document lay on the appellants, and in pointing out that it was for the appellants and not for the prosecution to call the surviving witnesses to the execution.

I concur in setting aside the conviction and ordering a new trial.

[CIVIL APPELLATE JURISDICTION.]

1881.
May 16th.

No. 22 of 1880.

TARINI PROSAD MISSER AND ANOTHER (DEFENDANTS)..... APPELLANT

AND

HURRISH CHUNDER CHOWDHRY AND OTHERS (PLAINTIFFS) ..... RESPONDE

Sonthal Regulation III of 1872 *section* 5—*Reference under Regulat III of* 1872, *section* 59 *Appeal from Order upon—Settlem Officers, Jurisdiction of—Settlement cases—Appeal—Act XXX of* 1855, *section* 2, *Officers appointed under.*

Under the notification of the Lieutenant-Governor of Beng dated 7th May 1872, which is still in force, the proper Officers entertain and adjudicate upon suits for land in the Sonthal Perg nahs, and to certify issues to a Civil Court under section 5 of Re lation III of 1872 are not Settlement Officers as such, but offic appointed under section 2 of Act XXXVIII of 1855. Accordin a Civil Court in the Sonthal Pergunnahs has no jurisdiction to issues sent to him by a Settlement Officer.

Where, however, it appeared that a Deputy Commissioner whom issues had been so referred for trial was also invested w the powers of a Settlement Officer, it was held that the proceedi taken before him might be regarded as purely settlement proce ings which he as a Settlement Officer was competent to deal w himself.

The High Court has no jurisdiction to hear an appeal from a order made by a Settlement Officer in the Sonthal Pergunnahs such.

See *Tarini Prosad Misser* v. *Mahommed Chowdhry*, 6 C. L. 555.

APPEAL from a decree passed by the Officiating Deputy Co missioner of Nya Doomka on the 18th June 1879.

In this case a Rule was obtained in the High Court on t 11th September 1879 to show cause why an appeal should not filed against the decree of the Officiating Deputy Commissioner n

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TARINI PROSAD MISSER v. HURRISH CHUNDER CHOWDHRY.

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appealed against. On cause being shown, the High Court (MITTER and MACLEAN, *JJ.*) allowed the appeal to be filed. The proceedings before the High Court will be found reported in 6 C. L. R., 555, *Tarini Prosad Misser* v. *Mahommed Chowdhry*, where all the facts are fully stated.

The appeal now came on for hearing before another Division Bench (CUNNINGHAM and PRINSEP, *JJ.*)

Baboo *Mohiny Mohun Roy* and Baboo *Hurry Mohun Chuckerbutty*, for the Appellants.

Baboo *Sreenath Dass*, Baboo *Chunder Madhub Ghose*, and Baboo *Koorona Sindho Mukerjee*, for the Respondents.

The judgment of the High Court (1) was as follows:—

This is an appeal from the finding of the Deputy Commissioner of Nya Doomka given on the 18th June 1879, on certain issues referred to him by the Settlement Officer under section 5 of the "Sonthal Pergunnahs' Settlement Regulation" Reg. III of 1872.

The material facts of the case are as follows:—

On the 17th August 1864, the plaintiffs respondents, purchased in execution sale of the Beerbhoom Civil Court the rights of three judgment-debtors in certain lakhiraj lands in the Sonthal Pergunnahs. In execution of another decree, they again on the 25th November of the same year purchased the rights of the same judgment-debtors in the same property as well as the rights in it of two other persons.

On the 31st July 1866 the plaintiffs applied for possession of their auction purchase under section 263 of Act VIII of 1859 by ejectment of the judgment-debtors. The present defendants objected, but the Court of execution did not think proper to decide their objections, and, reserving such matters for a separate suit, passed an order under section 264.

On the 13th June 1876 the plaintiff sued under section 26 of Regulation III of 1872 for possession of the purchased properties together with mesne profits stating that their cause of action had arisen in Magh 1273, *i. e.*, January—February 1867, the date on which they were dispossessed from the possession obtained under section 264.

(1) CUNNINGHAM and PRINSEP, *JJ.*

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TARINI PROSAD MISSER v. HURRISH CHUNDER CHOWDHRY.

Judgment.

On the 8th January 1877 the plaintiffs obtained a decree for possession. From this decree the defendants appealed, but, on obtaining a settlement of the disputed lands on 2nd July 1877, they subsequently withdrew their appeal.

On the 13th August 1877 the plaintiffs gave a receipt acknowledging that they had been put into possession of the disputed property under a purwanah of the Court.

On the 22nd August 1877 the defendant raised objections to the order of delivery to the plaintiffs, and on the 25th August 1877 the purwanah under which delivery was given to the plaintiffs was cancelled on the ground that, as the land in question had been settled before the execution of the decree, the decree must, in compliance with section 25 of the Regulation, remain unexecuted and the former holders be kept in possession. From this order the plaintiffs appealed to the Commissioner. Their appeal was rejected on 19th December 1877, a promise being at the time recorded that at the time of hearing the plaintiff's settlement appeal from the order of 2nd July 1877, which had at that time been filed, the whole question should be fully considered.

On the 11th June 1878 the Commissioner sitting in appeal from the order of 2nd July 1877 and referring to the promise given in his order of 19th December 1877, reviewed the whole case and directed it to be re-opened by the Settlement Officer. He observed that under section 5 of Regulation III of 1872 officers empowered to hear suits for land might refer issues to Courts established under Act VI of 1871, and that the local Government had selected Settlement Officers to hear such suits. Accordingly he directed the Settlement Officer to call upon the plaintiffs to file a statement of their claim, to enter it as a suit upon his file and to refer five issues, which he drew up, to the Courts established under Act VI of 1871.

In compliance with this order the plaintiffs on 16th June 1878, filed their petition, and, on the 15th July 1878, an amended petition containing further particulars.

The Settlement Officer on the 20th of July 1878 forwarded to the Deputy Commissioner of Nya Doomka the petition together with the settlement proceedings and his certificate under section 5 Regulation III of 1872 referring the five issues for decision by the Deputy Commissioner as a Civil Court.

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Judgment.

On the 18th June the Deputy Commissioner of Nya Doomka, who had previously on April 8th, 1879 been invested with the powers of a Settlement Officer, gave a decision upon the five issues referred to him which he certified to the Settlement Officer on the 24th July 1879. The Settlement Officer dealing with the Deputy Commissioner's decision on the five issues and referring to the circumstance that the Deputy Commissioner had been invested with the powers of a Settlement Officer, returned all the proceedings to that officer in order that he, being thoroughly conversant with the case, should amend the settlement record in conformity with his findings of 18th June. In compliance with this order the Deputy Commissioner on the 12th August 1879, acting in his capacity as a Settlement Officer, passed orders in the case, amending the settlement record in accordance with his finding of 18th June 1879, and defining the area to which the plaintiffs are entitled. After having failed to obtain an order from a Division Bench of this Court to set aside this order in the exercise of its extraordinary powers under section 15 of the Charter Act, the defendants on the 11th September 1879 petitioned the High Court to admit an appeal from the finding of 18th June 1879. As the right of appeal was doubtful, the Division Bench of this Court, before admitting an appeal, granted a rule in order to give the respondents an opportunity of showing cause against it. In showing cause against this rule, it was urged first, that the decisions of the Sonthal Officers, vested with powers of Courts under Act VI of 1871, were not appealable to this Court, and, next, that the order of 18th June 1879 was not a decree appealable under Act X of 1877. The Court held that an appeal from judgments of the Civil Court on cases properly certified under section 5 of the Regulation, would lie to the High Court, and, expressing a doubt as to the legality of the reference made in the present instance by the Settlement Officer, which led to the finding of 18th June 1879, left that question open for decision on the hearing of the appeal. (See Report of case—*Tarini Prosad Misser v. Mahommed Chowdhry*, 6 C. L. R., 555).

That appeal is now before us, and the first question which calls for consideration is, whether we can regard the decision of the Deputy Commissioner of 18th June 1879, as a finding of a Civil Court on a case properly certified under section 5 of the Regulation.

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Judgment.

By Regulation III of 1872, section 5 it was provided that, pending the settlement, suits regarding land and rent should be excluded from the ordinary jurisdiction of the Civil Courts established under Act VI of 1871. "Such suits", it was provided, shall be "heard and determined by the officers appointed by the Lieutenant-"Governor under section 2 Act XXXVII of 1855, or by the Settle-"ment Officers hereinafter mentioned, according as the Lieutenant-"Governor shall from time to time direct."

By Notification of 7th May 1872, the Lieutenant-Governor directed that, until further orders, the officers appointed under section 2 of Act XXXVII of 1855 should entertain and adjudicate suits for land under section 5 of the Regulation. According to this Notification the officers appointed under section 2 of Act XXXVII of 1855, and not the Settlement Officers, as such, are the persons empowered to try suits and, consequently, to certify issues to the Civil Courts under section 5 of Regulation III of 1872. We are not aware of the grounds on which the Commissioner finds that under Resolution of the Lieutenant-Governor "the Settlement Officers are selected to deal with cases under section 5" and consequently to certify under that section. No such Resolution has been brought to our notice, nor upon enquiries directed by ourselves could any such resolution be found; we are, therefore, constrained to hold that the Notification of 7th May 1872 is still in force, and that no such power has been conferred on the Settlement Officers. So far, then, as he was acting as a Civil Court, the Deputy Commissioner Mr. Oldham had no jurisdiction to try the issues sent to him. It appears, however, that he was vested with powers as a Settlement Officer and as such would be fully competent to deal with the case himself. Regarding therefore all proceedings taken as purely settlement proceedings, we do not think that the parties can in any way be prejudiced by the irregularity committed in sending the case to him under section 5. But if he has been acting as a Settlement Officer we have clearly no jurisdiction to hear an appeal from his orders. Such orders are appealable elsewhere, and provision has been made by the Regulation for enabling them to be questioned in a Civil suit by the party injuriously affected.

We accordingly dismiss this appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

1881.
June 13th.

No. 363 of 1880.

TUFFER CHUNDER BHUTTO, (PLAINTIFF)... APPELLANT;

AND

OTENDRO MOHUN TAGORE AND OTHERS, (DEFENDANTS)..... RESPONDENTS.

Riparian Embankments—Embankment, Nature of obligation of zemindars to repair—Liability to repair embankments ratione tenurae—Public Liability to repair—Act VI (B. C.) of 1873.

The villages of B and R which were contiguous, the former being to the North of the other, both fronted a river on the same side. There was a marginal embankment on the river frontage to keep out floods, but on the Southern boundary of R there was a side embankment running inland from the marginal embankment. This side embankment having been breached, the flood passing through R inundated and caused damage to B.

The plaintiff who was the putnidar of B sued the zemindars in whose zemindary R was situate to recover the damage, on the ground that the damage had been caused by the defendants' neglect to keep, as he alleged it was their duty, the embankments in proper repair.

The defendants by their kabuliut, dated 30th May 1794 under which they held their zemindary from Government covenanted "to do embankment works at the proper time and to bear any loss caused by negligence in respect thereof," and also to pay full rent notwithstanding drought or inundation.

The defendants admitted that under a subsequent agreement with the Government they were in receipt of an annual sum, as a contribution for the repair of embankments in their zemindary, but the agreement was not produced. It did not appear whether the particular embankment which had been breached was affected by the agreement, nor was there sufficient evidence to show from what time that embankment had been in existence. There was no evidence of prescriptive right.

Held, (1) that under the Common Law of this country there

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NUFFER CHUNDER BHUTTO v. JOTENDRA MOHUN TAGORE.

Statement.

was no liability cast upon a riparian proprietor to construct ficial works or keep them in repair.

cf. *Hudson* v. *Tabor*, L. R., 2 Q. B. D., 290.

(2) that if the embankment in question had been in exis when the kabuliut was executed, the defendants might be l thereunder on the principle of the case of the *Mayor of Regis* v. *Henby*, 2 Cl. and Fin., 331, and (3) that if the a ment under which the Government contribution for the r of embankments was made was not for the sole benefit o zemindars, but was intended to impose an obligation of p and general concern upon them, and it applied to the parti embankment and the inundation had been caused by the defend neglect, the plaintiff, would be entitled to succeed on principle of the case of the *Mayor of Lyme Regis* v. *Hen* Cl. and Fin., 331.

The case was remanded to take evidence as to the natu the agreement.

History of the law relating to embankments in India discus

APPEAL from a decree of the District Judge of Moorsh bad, dated the 17th November 1879 reversing the decree o third Moonsiff of Berhampore, dated the 30th June 1879.

The plaintiff who was the putnidar of the villag Belun sued to recover damages from the defendants, thr an inundation of their lands caused by the neglect of defendants to keep in order an embankment which, as alleged it was their duty so to keep.

The villages of Belun and of Rameshurpore of which defendants were the zemindars, both fronted the river Da on the same bank, and were contiguous, the former bein the north and the latter to the south.

There was a marginal embankment on the river fro to keep out floods. Besides this embankment at the Sou limit of Rameshurpur there existed a side embankment ru inland from the marginal embankment to the high ground.

In 1876 the flood breached this embankment, and flo through the lands of Rameshurpore inundated the lan Belun, and caused the damage complained of in this suit.

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Judgment.

The defendants were the zemindars of Pergunnah Rukunpur which included the village of Rameshurpore.

The Moonsiff gave a decree for the plaintiff, but that decree was reversed by the District Judge.

The plaintiff has now preferred this second appeal to the High Court.

Branson, Baboo *Guru Dass Banerjee* and Baboo *Rash Behary Bose*, for the Appellant.

H. Bell and Baboo *Nilmadhub Bose*, for the Respondents.

The following judgments were delivered by the High Court (1) :—

PONTIFEX, *J.* :—The defendants are zemindars of Pergunnah Rukunpur, which contains a village called Rameshurpore bounded on its west side by the hill stream or river Daroka. The plaintiff is the putnidar of Belun, lying alongside and to the north of Rameshurpore, and also bounded on its west side by the Daroka. The plaintiff complains that the Daroka having burst into Rameshurpur through its south side has thence inundated Belun; and asserting that the zemindars of Rukunpur are bound to maintain embankments to keep out the Daroka, claims damages against the defendants on the ground that in consequence of the neglect to maintain proper embankments at Rameshurpore injury has been caused to Belun by the invasion of the water through Rameshurpore. PONTIFEX, *J.*

Now if the defendants are liable, this liability must exist either—

1. By the original or common Law of the land; or 2, by prescription; or 3, *ratione tenuræ;* or 4, under an obligation of public concern for the observance of which public money is paid to them.

With respect to (1) the original or common Law liability, no authority has been adduced to show that any such liability exists. And even if it did exist it would scarcely apply beyond the repair of the ordinary or natural bank of the river, and would probably carry with it the correlative obligation of con-

(1) PONTIFEX and FIELD, *JJ.*

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NUFFER CHUNDER BHUTTO v. JOTENDRA MOHUN TAGORE.

Judgment.

PONTIFEX, J.

tribution to the expense of repairs by all parties protected or benefitted. But the Daroka is a hill stream liable to sudden freshes; and the plaintiffs claim that the defendants are bound not only to preserve the natural bank, but to erect and maintain an artificial embankment without any liability on the part of the owners of Belun to contribute to the expense thereof. I am of opinion therefore that the defendants are not liable by the original or common Law.

Next with respect to (2), or liability by prescription. This could only be established by evidence, and the Lower Appellate Court has found and indeed it is admitted, that there is no evidence to support a liability by prescription.

Thirdly with respect to (3) or liability *ratione tenuræ*.

If it had been proved that the embankment on the south side of Rameshurpore was in existence on the 30th of May 1794, the date of the kabuliut under which the defendants hold Rukunpur from Government, I am inclined to think the defendants might be liable at the suit of the plaintiff in the same way as the Corporation of Lyme Regis were held liable at the suit of a stranger in the case of *Mayor of Lyme Regis* v. *Henby*, 2 Cl. and Fin., 331.

For the kabuliut contains two clauses with respect to inundations: The first clause is, "I shall not object to pay the full rent on the score of drought or inundation. I shall bear all losses which shall be incurred on that account." This clause was evidently intended to protect the Government against any claims by the zemindar for remission of rent on account of losses by inundation.

But at a much later part of the kabuliut occurs this other clause "I shall do embankment works of the said mouzahs at the proper time. Should there be any loss from my negligence, I will bear the same."

If this was intended as the defendants argue, to protect the Government from claims for remission, it would be surplusage. Another meaning must therefore be sought for. It may be said that it was intended only to protect the Government by preserving this security for their rent intact. This might be a fair argument if the zemindary was in the neighbourhood

of a large and destructive river which might not only inundate, but absolutely obliterate it, making it an unproductive waste of water. But this does not seem to be the character of the Daroka, and besides this argument might be pushed further to show that it was equally the interest of Government to preserve the adjacent settlements. It is difficult to understand why the Government imposed liability under the 2nd clause unless it was for the public benefit, that is the benefit of all those whose lands would be protected by the embankment; and the fact that the Government made the settlement permanent would be a sufficient consideration for the obligation.

But though the Moonsiff held that this particular embankment was in existence at the date of the kabuliut, he seems to me to have arrived at that conclusion upon insufficient evidence, and I am inclined to agree with, as we are bound by, the finding of the Lower Appellate Court upon this question of fact, that the embankment in question has not been proved to have been then in existence, and if it was not in existence I do not think the zemindar would be bound to maintain it by the terms of his kabuliut. I am therefore of opinion that the defendants are not liable *ratione tenuræ*.

Lastly with respect to (4), or liability under an obligation of public concern with respect to which the defendants have received, and still continue to receive public money for the purpose of keeping embankments in repair.

The defendants admit that they receive an annual sum of Rs. 733-1 from the Government as a contribution to the repairs of embankments in pergunnah Rukunpur.

This contribution must be payable on some agreement subsequent to the kabuliut, because it is opposed to its terms. The defendants do not produce the agreement, or state for the repair of what embankments the contribution is made. But section 36 of Act VI (B. C.) of 1873 referring to this contribution by the Government speaks of embankments generally and also refers "to any embankment."

Now if the defendants receive this contribution by Government in consideration of maintaining the embankment in question in this suit and if the terms of such agreement show that

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POSTHER, J.

it was intended to impose the obligation for the public benefit. I am of opinion that they would be liable at the suit of the plaintiff on the principle of the plaintiff in the *Lyme Regis* case. If, however, they can show that the agreement under which the contribution is made was solely for the benefit of the zemindars, which, looking to the terms of the kabuliut and the provisions of Act VI of 1873, seems to me, as at present advised, an unlikely conclusion, then the plaintiff would not be entitled to sue.

But no evidence has been given as to the date or terms of this agreement, or as to whether it affected this particular embankment. Assuming the agreement was not for the sole benefit of the zemindar, but was intended to impose an obligation of general and public concern, then if it was general in its terms and applied only to embankments existing at its date, it would be for the plaintiff to show that this particular embankment did then exist. On the other hand if the agreement contemplated the construction and repair of all embankments necessary for keeping out the river, it would be for the Court to decide whether this particular embankment was included within its scope, or rather whether the particular inundation of which the plaintiff complains was caused by the zemindar's neglect of his obligation.

In my opinion before dismissing the plaintiff's suit, some enquiry should have been made with respect to these matters. But so far as I can see no issue was raised in the lower Courts for this purpose although the plaint raised the question.

I would, therefore, remand the case to the Moonsiff's Court for the trial of these additional issues.

1. When was the agreement as to contribution by Government referred to in Act VI (B. C.) of 1873 made, and what were its terms?

2. Did it relate to embankments generally, or to such as might be necessary for keeping out the river, or to such only as were in existence at its date?

3. Was the embankment in question in this suit in existence at the date of the agreement?

4. Was the obligation imposed by the agreement an obli-

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tion of general and public concern, and are the zemindars und by it to repair the embankment in question, so as to ake them liable at the suit of the plaintiff for special damage casioned by its breach?

Having tried these issues, the Moonsiff will re-consider his dgment; and if—and when the case goes on appeal to the wer Appellate Court that Court must also try the issue, ready decided by the Moonsiff but not yet tried by the Lower ppellate Court—whether the inundation complained of by the aintiff was caused by defects in this particular embankment : was occasioned by defects in embankments at Guthla or sewhere. And the Lower Appellate Court will re-consider s judgment in the whole case. Both parties will be at liberty) adduce fresh evidence, and the costs of suit including ie costs of this appeal, will abide the result.

FIELD, *J.*

FIELD, *J.*:—The defendant in this case, Maharajah Jotendro Mohun Tagore is the zemindar of pergunnah Rukunpur, in hich is included the village Rameshurpore. The plaintiff is ie putnidar of Belun, a village which lies to the north of, and ljacent to Ramehsurpore. The plaintiff claims Rs. 506 as amages for the destruction of crops in Belun which, he alleged as caused by the fact that the defendant being bound to pair certain embankments along the bank of the river Daroka, eglected to do so; and, in consequence, the waters of this river oke into Belun and inundated the plaintiff's village.

The plaint is not very scientifically drawn, but we find in matter which may be construed so as to base the defendants' ability to maintain or repair the embankment upon one of the ur following grounds, which are indeed the only grounds pon which it is possible to base it, *viz.*:—

(1). Common Law.

(2). Liability by prescription.

(3). A duty created by the conditions of the original ant at the time of the Permanent Settlement.

(4). A duty arising out of the circumstance of Government making an allowance for the particular purpose of repairing the embankments of the Pergunnah.

Before dealing with these four questions, I propose to

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consider the Regulations and Acts which have from time t time being passed by the Legistature upon the subject of em bankments in these Provinces, and some of which were referr to in the course of the argument in this case. There can l no doubt that the construction and maintenance of embank ments were common in Mahomedan times; and were, to certain extent, necessary in consequence of the physical featu of the country. Many embankments, were maintained Government and this for several reasons: The necessary wor required skill and expenditure which were beyond the resour of private individuals; or the embankments, more especial in the district of Moorshedabad and its vicinity, were on large scale necessary and intended for the protection of the ci which was the seat of the Court, and the surrounding countr Naturally the construction, maintenance and repair of su works were entrusted to the State Officials immediately con nected with the Court. Other embankments were maintain by zemindars, who, it will be remembered, were the office of Government, and who were allowed to deduct the amoun expended by them from the revenue collected for, and remitt to, the Government.

When arranging the terms of the Permanent Settlemen the Government were very desirous that the revenue should paid in one fixed snm; and that there should be no complicati with miscellaneous petty charges which had a constant tenden to increase. It appears to me that section 72 of Regulati VIII of 1793, was directed to carry out this intention of Gover ment. This section enacts as follows:—"The Settlement is to made, as far as possible, in one neat sum, free from any charg of moshaira, zemindari, amlah, poolbundi, cutcherry charges, others of a similar nature; it being intended that all charg incidental to the receipt of the rents of the lands, and independe of the allowances of the officers of Government and expen attending the collection of the public revenue, shall be defray by the proprietors from the produce of their lands." I do read this section as relating or imposing any liability up zemindars to construct or maintain embankments, as a nec sary incident of their zemindari tenure, I think it is concern

different object, namely, that of making the land revenue
e in one lump sum not complicated with, or liable to
on by miscellaneous or petty charges. At the time of
rmanent Settlement, certain stipulations on the subject
bundi were inserted in some of the kabuliuts executed
zemindars. These stipulations were very wide and
, and did not exactly define the liability imposed thereby
ıe zemindars who executed such kabuliuts. There can
oubt that the Government was, in 1793, to some extent,
) the importance of this construction and maintenance
: works. We find in the Preamble to Regulation II of
ıe following passage:—"The extensive failure or de-
n of the crops that occasionally arises from drought or
ion, is in consequence invariably followed by famine,
ages of which are felt chiefly by the cultivators of the
l the manufacturers, from whose labours the country
both its subsistence and wealth. Experience having
that adequate supplies of grain are not obtainable from
in seasons of scarcity, the country must necessarily con-
ıbject to these calamities, until the proprietors and culti-
f the lands shall have the means of increasing the num-
he reservoirs, embankments and other artificial works,
h, to a great degree, the untimely cessation of the
al rains may be provided against and the lands protect-
inundation." In the Code of Regulations all of which
ssed upon the same day, *viz.*, the 1st May 1793 we find
ulation especially concerned with the subject of em-
nts, namely, Regulation XXXIII of 1793. The Pream-
st Regulation is as follows:—"It being necessary that
n should be made for the annual repair of certain em-
nts in different parts of the country, which have been
d as public works and have been kept in repair at the
of Government, in consequence of their great extent,
mage to which the districts and places for the pro-
which they have been constructed would be liable
lation, in the event of their not receiving the neces-
l repairs; and there being the strongest grounds
that if the embankments, reservoirs and water-

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courses in the estates of individuals, which are not consid as public works, were enlarged or put into a proper sta repair, and new works of the same nature made where nece and practicable, a sufficient portion of the crops might be served in seasons of drought or inundation for the subsist of the body of the people, and consequently the recurren the miseries which this country has so often suffered famine be prevented, &c." Now, this Preamble contem embankments of two classes: (1). Embankments whic public works, were erected and are maintained by Govern at its own expense. (2). Embankments in the estates of viduals which were not considered as public works, but whic Government contemplated being enlarged or put into a p state of repair, and where it contemplated the constru of new works of the same nature at the expense of indiv zemindars. Sections 2 to 7 of this Regulation provide fo maintenance and repairs of the first class, which may be t ed public embankments. The remaining sections 8 to 15 vide for the making of advances by Government to zemi for the purpose of enabling them to construct new embankm and repair or enlarge the old ones. These advances were repaid with 12 per cent. interest; and the collectors we supervise the expenditure of the money so advanced penalty of 25 per cent. was imposed in case the works were carried out. This Regulation contains no provision for pelling zemindars to carry out the general stipulations poolbundi which were inserted in their kabuliuts. In kabuliut which has been before us in this case, this stipul as to poolbundi is generally expressed, no particular emb ments being specified as the embankments to be kept in re as a natural result constant disputes arose between the ze dars and the officers of Government as to what embankm were to be repaired by Government and what by private dividuals. The zemindars were found unwilling to take adva upon the terms provided by the Regulation; and the old bankments were not maintained in proper repair, much were new works undertaken as the Government had h that they would be. Fresh legislation became in consequ necessary within a very few years after the Permanent Se

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t; and accordingly we find a new Regulation enacted in
, *viz.*, Regulation VI of that year. The Preamble to this
ulation contains the following significant recital:—"Where-
t is essential that further provisions should be made for
more effectual repair of the embankments which the zemin-
and talookdars are bound, under the conditions of the
manent Settlement of the land revenue, to maintain at their
expense." Sections 2 to 10 of this Regulation provide for
repairs and maintenance of public embankments, and the
of carrying out these works to be discharged by embank-
t Committees. Then comes 11. This section invested the
mittees with a general control over the embankments which
repaired at the expense of the zemindars and farmers as
as those which were maintained by the Government and
section proceeds:—"By this rule it is not intended to in-
re with the zemindars and farmers in the repair of the
nkments situated in the lands held by them, so long as
duty shall be effectually and properly performed. The
mittees shall, however, be at liberty, whenever they may
it necessary to call upon any zemindar or farmer, either
perwannah from themselves or through the Collector, as
be deemed preferable, to make such repairs to the embank-
situated in the lands of such zemindar or farmer as may
quired. Should any zemindar or farmer, after the receipt
h perwannah, neglect to make the necessary repairs, the
ittee shall submit to Government an estimate of the
e required for that purpose, and the repair shall in all
ses be made by the officers of Government, and the
recovered from the zemindar or farmer who was bound
the embankments in a proper state of repair." The
ng sections of this Regulation provide for cuts and
embankments and for the prosecution and punishment
s damaging or injuring embankments. No provision
wever, made for determining whether any particular
ent was one which the zemindar was bound, under
tions of the Permanent Settlement, to maintain at his
nse. And further we find no provision as to the
which sums expended upon the repair of embank-
to be recovered from the zemindars, if they did not

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discharge them voluntarily. But in those days the rule of t land only just commenced, and no zemindar would have thou of resisting the perwannah of the embankment Committee, o the Collector. Such a perwannah issued under the expres thority of a Regulation being regarded an order of the Su or Government. The power of the Executive being thus brou to bear directly upon zemindars, in this matter there app to have been no further difficulty felt for a number of ye and we find no further legislation till 1829.

Regulation XI of that year merely abolished embankm Committees and transferred their duties to such officers as m be appointed by the Governor-General in Council. We l nothing then till we come to Act XXXII of 1855 which rep the previous Regulation, and substitutes amended provis therefor. The provisions of this Act are briefly as follow A public embankment was defined to be an embankm which is now kept up or may hereafter be kept up by officers of Government at the expense either of Gov ment or of any private individual. In many insta zemindars in order to escape the responsibility and troubl maintaining and repairing embankments by their own age had compounded with Government to have the work by the officers of Government who had charge of the pu embankments. It is matter of history that the Rajah Burdwan gave up the annual sum of Rs. 60,000 which at time of the Permanent Settlement was deducted from his j in consideration of his undertaking the duty of poolbo But to return to the Act of 1855, a Superintendent of emb ments was appointed under the provisions of this Act and he vested with large powers of effecting improvements (1 taking over private embankments, (2) by removing those w proved obstructive to drainage, (3) by changing the line of public embankment or taking a new one and (4) by enlar &c. any embankment. The Revenue Authorities were now the first time vested with exclusive jurisdiction in all ma provided for by the Act and the jurisdiction of the Civil Co was expressly excluded. There was also a provision in secti that the cost of keeping up private embankments taken u Government was to be charged upon persons bound to kee

such embankments. But in this Act as in previous enactments, no provision is made for deciding in any particular case whether any individual embankment was to be repaired at the expense of Government or at that of the zemindar in whose estate it is situated. The rest of the Act provides for compensation to persons injured by the works; for making sluices and cuts; for specifications and estimates of the expense of keeping up the embankments maintained at the cost of the zemindars and others; and for the recovery of these expenses as arrears of revenue. The law remained in the state in which this Act of 1855 left it until 1873 when Act VI of that year was enacted by the Bengal Council. This Act repealed Act XXXII of 1855. It defined a public embankment to be an embankment maintained by the officers of Government. The main features of this Act were these:—

(1). The powers of the Superintendent were transferred to the Collector and enlarged for the construction of new works and for improvements. In fact by the Act of 1855 and, more especially by this Act of the Bengal Council, the Collector was invested with authority similar to that exercised Commissioners in England under 3 and IV Will. IV Cap. 22; 4 and 5 Vic. Cap. 45; 12 and 13 Vic. Cap. 50; 23 and 24 Vic. Cap. 51; and other statutes of Sewers; 6 Henry VI Cap. 5.

(2). The costs of all works executed under the Act were to be borne rateably by the zemindars of the estates in which were situated the lands benefitted or protected by the repairs or works executed similarly in England. All persons whose property derives any advantage from the works of the Commissioners may be assessed in respect of that property—*Soady* v. *Wilson*, 3 A. and E., 248.

The zemindars were empowered to levy a certain proportion of those expenses from the tenure-holders who were subordinate to them. Now it may be contended that the adoption of this principle of rateability in this Act amounted to a virtual renunciation on the part of Government of the principle which as I have pointed out had existed in former enactments, the principle that is, of making individual zemindars personally liable for the costs of maintaining those embankments which were situated in their estates. From what has already been said,

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it will be seen that the change thus made in the land had the effect of introducing into this country a principle which has long existed in England, and has been recognised and regulated by the statutes of sewers, under which the burden of keeping up sea-walls, embankments and similar works is thrown rateably upon the persons whose property is benefitted by the construction and maintenance of these works.

(3). The Engineer was entrusted with certain powers for the repair of public embankments, these powers to be exercised subject to the control of the Collector.

(4). A specification, to be found in Schedule D of the Act set out, enumerated for the first time the embankments which are maintainable at the expense of Government, and the Lieutenant-Governor is vested with power to enter any new embankment in this Schedule or to remove any existing embankment therefrom.

(5). Schedule (E) contains a further specification of certain sums contributed annually in accordance with custom for certain pergunnahs in the Moorshedabad District towards the maintenance of the embankments thereof, and it is to be observed that Rukunpur, the pergunnah with which this suit is concerned, is one of the pergunnahs specified in that Schedule. The jurisdiction of the Civil Courts is included in respect of all things done under the authority of the Act.

I now turn to the four questions, which as I have already mentioned, have to be disposed of in order to the decision of this case; and the first of these questions with which I have to deal is whether there is any common law liability cast upon the defendant to repair the particular embankment with which this case is concerned. Now in the whole of the legislation which I have just examined there is nothing to be found which presupposes or assumes any such liability; and this point is of the more importance when we remember that the Preambles of the old Regulations contain in very many instances a recital of what the framers of those Regulations considered to be the antecedent common law of the country. The only liability is based upon the conditions of the Permanent Settlement: and this is very different from common law liability. It there had been any such common law liability, it would have been unne-

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r to insert special stipulations in the Permanent Settle-
kabuliuts. It would be reasonable to suppose that the
ɛtor of an estate bordering upon a river should not be
d to alter the natural condition of the land so as to
injury to his neighbours by letting the water in upon
ands; but there is nothing reasonable in the supposition
ıch a proprietor should be compellable to construct and
ıin artificial works in order to confer a benefit upon his
ɔours by protecting their lands from inundation that
happen in the normal state of things. He might
f receive little or no advantage from expensive works,
nefit of which would be enjoyed by strangers, who had
ɔuted nothing towards their construction or maintenance.
ling to my view, and so far as I have been able to dis-
there is under the common law of this country no
y cast upon a riparian proprietor to construct artificial
or keep them in repair. There is no such common law
y in other countries so far as I have been able to dis-

In England it has been decided in the case of *Hudson*
or, L. R., 2 Q. B. D., 290 that apart from prescrip-
there is no liability cast on a frontager to maintain
for the protection of the land. At page 294 of the
; in this case the ancient usage of the realm is discussed
rd COLERIDGE, *C. J.* says:—"The whole of this procedure
ntirely inconsistent with the notion that at common law
rontager could be compelled by action to repair any part
ch defences which had been injured by the outrageous-
of the sea." And an examination of the rest of the
nt shows that according to the view taken by the Court
eal in that case there is cast upon a frontager by the
n law no liability to put fresh materials on the top of
wall from time to time in order to keep it up to the
eight. See also the report of this case in the Court
L. R., 1 Q. B. D., 225. In the case of *Rex* v. *The*
Commissioners, 8 B. and C., 355 it was decided that no
lay upon persons occupying lands adjoining the sea
orks for the protection of their neighbours, and that
no liability to identify them against loss.
case of *Morland* v. *Cook*, L. R., 6 Eq., 252 there

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CLARKE
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and
TAYLOR

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was an acre-scot held rateably for the repair of these works. It was here based upon a covenant; and this covenant was held to be binding on purchasers without notice thereof. An examination of the cases upon this subject will show that the liability to construct or repair sea-walls was in some instances imposed on individuals by covenant amongst themselves; and in other instances is regarded as a liability of contributing rateably imposed by the common law, upon all persons benefitted by the construction and maintenance of such works. In the case of *Rex* v. *The Commissioners of Sewers for Essex*, 1 B. and C., 477 it was held that all persons enjoying the benefit of a sea-wall are bound and liable at common law to repair and maintain it in the absence of any special custom or contract for that purpose. This liability is opposed to the supposition of any exclusive liability on the part of an individual to construct or maintain a sea-wall or embankment upon his own land for the benefit of his neighbour's lands.

Then, secondly, is the defendant liable by prescription. On this point it may be sufficient to say that no case of prescription has been established by the evidence, and very strong and clear evidence would be necessary in order to establish such a prescription. In the case of *Mason* v. *The Shrewsbury and Hereford Railway Company*, L. R., 6 Q. B., 578 a natural water-course, called Ashton Brook, flowing through the plaintiff's land had been diverted for upwards of forty years by a Canal Company under the powers of their Act, and the bed had become silted up, and was no longer adequate to carry off the flood water in its natural state. The canal was discontinued and the waters restored to their former course, and the plaintiff's land was thereby flooded and damaged. The Court held that the plaintiff had no legal ground of complaint, BLACKBURN, J., said:—"Before the canal was made, the person "whose estate the plaintiff now has had the ordinary rights and "liabilities of a riparian owner on the banks of a natural "stream. He was entitled to have the water flow to him in its "natural state, so far as it was a benefit as, for instance, to "turn his mill or water his cattle; and he was bound to submit "to receive the water, so far as it was a nuisance as by its "tendency to flood his lands." Now this is a strong case

eeing that the canal works had been in existence for more han forty years; and notwithstanding this, it was held that he plaintiff had no legal right to the continuance of the enefit conferred upon him by their construction. See also *Tudson* v. *Tabor*, where it was remarked that the mere fact hat each frontager has always maintained the wall in front f his land, and that no one had thought it necessary to erect a vall to protect his land from the water which might come from his neighbour's land, was not sufficient evidence to establish a prescriptive liability in the part of the defendant to maintain the wall for the protection of the adjoining landholders.

I come now to the third question—is the defendant bound by the conditions imposed upon him by the original grant made to him at the time of the Permanent Settlement? The stipulation in his kabuliut is as follows:—"I shall make embankment works of the said mouzahs at the proper time; should there be any loss from my negligence, that loss shall be mine."

Now I think there can be no doubt that the effect of section 67 of Regulation VIII of 1793 was to make this stipulation in the kabuliut binding upon him for all future time. It is possible that this stipulation was made in the interests of the ryots and was in furtherance of the policy which the Government of the time enunciated in many of the Regulations, the policy, that is, of protecting and providing for the interests of the ryots. Two points have to be considered in connection with the questions with which I am now dealing, first, if there was such a liability imposed by the original grant, can, the plaintiff maintain this suit, seeing that he was no party to that contract—if the term 'contract' may be applied to the agreement entered into between the Government and the zemindar, and secondly, is the embankment with which this case is concerned within the provisions of that stipulation? Now that the plaintiff can maintain that suit, I think that the case, *The Mayor of Lyme Regis* v. *Henby*, is an authority. In that case PARKE, *J.*, said:—"It is, however, further urged that whatever engagement the Corporation may be under as between them and the Crown, so as to render them liable either to forfeiture of their Charter, or any other proceed-

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" ing by the Crown, yet that no stranger can take advant
" of such engagement and maintain an action. It is admit
" that if their liability arose by prescription, they would be
" dictable, and also an action would be for special damage
" in the *Mayor &c., of Lyme* v. *Turner; Churchman* v. *Tann*
" *Paine* v. *Partridge* and many other authorities which it is
" necessary to cite, because it is clear and undoubted law t
" whenever an indictment lies for non-repair, an action on
" case will lie at the suit of a party sustaining any pecu
" damage. Now we are unable to see any sound distinct
" between a liability by prescription and a liability aris
" within time of memory, but legally evated. We do not
" that prescription necessarily implies a Charter or gr
" but it necessarily implies some legal origin and a Cha
" would be a legal origin. Suppose that a prescript
" obligation were alleged, and that a Charter granted
" fore time of memory were produced, and so the legal or
" were shown, would that destroy the prescription? Certai
" not, would the obligation arising from that Charter have b
" less binding within a few years after it was granted, tha
" is now after a great lapse of time? Certainly not. If t
" the origin be legal, how can it be important when it t
" place? We do not go to the length of saying that a stra
" can take advantage of an agreement between A and B,
" even of a Charter granted by the King, where no matte
" general and public concern is involved, but where that is
" case, and the King for the benefit of the public, has made a
" tain grant, imposing certain public duties, and that grant
" been accepted, we are of opinion that the public may enf
" the performance of those duties by indictment, and individ
" peculiarly injured, by action." Whether the grant to
defendants in this case was a matter of sufficient general
public concern is a question which I think it will not be ne
sary to decide upon this part of the case, because upon the se
point which I am about to notice, I am satisfied that no liab
under the conditions of the kabuliut can be enforced a
this particular embankment. Were it otherwise, I w
have no hesitation in deciding that both the grant and
stipulation of the grant were of general and public concern

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The second point to be considered in connection with this third question is—whether this particular embankment is within the covenant contained in the defendants' kabuliut. The Moonsiff has found that it is, but it appears to me that this finding is based upon insufficient evidence; and I concur in the decision of the District Judge upon this point. It was argued before us that the condition in the kabuliut ought to apply not only to the embankments which were in existence at the time of the Permanent Settlement, and which might have been supposed to be within the intention of the Government, and the zemindar who executed the kabuliut, but also to all embankments which might at any future time be considered necessary for the protection of the land, but this is an argument with which I am unable to concur. The progress of the country and of engineering skill, and the increase of population necessitating the bringing of fresh land into cultivation have within recent years rendered possible and created a demand for works of reclamation and drainage which cannot reasonably be supposed to have been within the contemplation and intention of the Government and the zemindars of 1793. I think then that the only reasonable construction to be put upon the kabuliut is that the zemindar is bound to repair such embankments as in 1793 and previously had usually been repaired by the zemindar. As the District Judge has found that the particular embankment in this case does not fall within that category, I think that the defendant cannot be made liable to repair this embankment upon the basis of any stipulation contained in the original kabuliut.

Then as to the fourth and last point—is the defendant bound to repair by reason that this is one of the embankments for the repair of which he receives a contribution from the Government? I think that there is not sufficient evidence upon the record to enable us to determine this point, and that there ought to be an enquiry as to the circumstances under which, and the objects for which, this allowance has been made by Government; and I concur in the remand order proposed by my learned colleague.

"... yet that no
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...ode is
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...uthority to affix it.

...rson, therefore, who has given orders for the p...
...tain receipt forms similar to those formerly used by ...
Company and corrected the proofs of the same, it being his in...
to use the receipt forms in order to commit a fraud, cannot b...
victed of forgery until one of the printed forms has been conv...
by him into a false document, nor of an attempt to commit for...
until he had done some act towards making one of the forms a ...
document. Until a form had been converted into a false doc...
all that was done consisted in mere preparation for the comm...
of an offence.

An attempt to commit an offence must be to do that w...
successful would amount to the offence charged.

Per GARTH *C. J.*:—The fact that the word "make" is ...
section 464 of the Penal Code in conjunction with the ...
"sign" "seal", or "execute" clearly denotes that the mak...
a document does not mean writing or printing it, but signi...
otherwise executing it.

APPEAL from a conviction and sentence passed by the S...
Judge of Burdwan.

The appellant was convicted of an attempt to commit f...
under circumstances which will be found stated at length ...
judgments of the High Court.

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In re REASAT ALI.

Judgment.

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form would not be a false document. Their view, as I underst it, was, that the commencing to print or write a docum which, when completed, was intended to be a false docum amounted, if coupled with the intent to defraud, to an attemp commit forgery. But it has been suggested, that the printing correcting of a form, which is intended by additions, which are be made to it, to be a false document, is in itself the making of a of a false document within the meaning of section 464, and th fore amounts to forgery.

If this were so, it seems to me, that the mere printing writing of a single word upon a piece of paper, however inno the word might be, would be the making a part of a false docum if it were coupled with an intention to add such other words to it would make it eventually a false document.

In my opinion, this is very far from the meaning of sec 464;—and I think that such a construction of the section invo a misconception not only of the word "make," but also of sense in which the phrase "part of a document" is used in section.

I consider that the making of a document does not m "writing" or "printing" it; but signing or otherwise execut it;—as in legal phrase we speak of "making an Indenture" "making a Promissory note," by which is not meant the writing of the form of the instrument, but the sealing or signing it as deed or note. The fact that the word "makes" is used in t section in conjunction with the words "signs", "seals" or "execut or "makes any mark denoting the execution &c." seems to very clearly to denote that this is its true meaning. What c stitutes a false document or part of a document is not the writi of any number of words which in themselves are innocent, but affixing the seal or signature of some person to the docume knowing that the seal or signature is not his, and that he gave authority to affix it. In other words the falsity consists in document or part of a document being signed or sealed with name or seal of a person who did not in fact sign or seal it.

Referring then again to the finding of the Jury, the ques in this case seems to be, whether what the prisoner did amo ed to preparation only, or to an actual attempt commit offence.

In the case of *Queen* v. *Cheeseman*, Leigh and Cave's R., 145, ord Blackburn thus defines an attempt to commit a crime. He ys, "There is no doubt a difference between the preparation antecedent to an offence and the actual attempt; but if the actual transaction has commenced, which would have ended in the crime, if not interrupted, there is clearly an attempt to ommit the crime,"—and in *Reg.* v. *McPherson*, Dearsley and Bell Crown Cases, 202, COCKBURN, *C. J.* says:—"the word attempt clearly conveys with it the idea, that if the attempt had succeeded, the offence charged would have been committed. An attempt must be to do that, which if successful, would amount to the felony charged."

It seems to me, that this definition of an attempt to commit an fence is a sound one; and applying it to the present case, the estion is, whether, what the prisoner did amounted to an attempt make a false document.

I have already said, that in my opinion, the printed form was ot in itself a false document, and that it would not have become false document, or part of a document, according to the definition section 464, until the seal or signature of the Bengal Coal Comny had been forged upon it, so as to make it appear that such seal signature was that of the Bengal Coal Company.

The prisoner, therefore, would not be guilty of the offence of gery, until the printed form had thus been converted into a false ument; and for the same reason, I think that he would not be ty of attempt to commit forgery, until he had done some act rds making one of the forms a false document.

If for instance, he had been caught in the act of writing the e of the Company upon the printed form, and had only completed gle letter of the name, I think that he would have been guilty e offence charged, because (to use the language of Lord burn), "the actual transaction would have commenced, would have ended in the crime of forgery, if not inter- "

nt, as it was, all that he did consisted in mere preparation commission of the crime.

was no more guilty of an attempt to commit forgery in the form printed, than he would have been of an attempt to

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commit burglary, by having a false key made of the house where h intended to commit the offence.

I think, therefore, that the conviction should be set aside, and the prisoner discharged. He may think himself extremely fortunate, that his premature arrest prevented him from completing what he evidently intended.

PRINSEP, *J.*

PRINSEP, *J.*:—I concur in setting aside the verdict of the Jury and the sentence passed on the appellant, because in my opinion the acts found by the Jury to have been committed do not amount to an attempt, but, at most, only to a preparation to commit a forgery which might have proceeded no further. I agree in the opinion expressed by the Chief Justice regarding the legal definition of an attempt to commit an offence, *viz.*, that there must b something "commenced which would have ended in the crime, i not interrupted."

The prisoner must therefore be acquitted and released.

[ORIGINAL CIVIL JURISDICTION.]

A. FALLE AND OTHERS ..... PLAINTIFFS; 1881. *March 7th.*

AND

S. F. MACEWEN AND OTHERS ..... DEFENDANTS.

Mutual Benefit Society—Subscribers, Power of majority of, to alter rules—Majority of Subscribers, Power of, to alter rules of Society—Interest of members of Mutual Benefit Society.

The U. S. F. P. Fund, which was established for the purpose of securing a provision for the widows and children of its subscribers, originally, or prior to 1850, was subject to the following rule (33), "That widows being incumbents on the Fund shall be paid their pensions at any place they may desire either monthly, quarterly or half yearly, subject to the usual charges of remittance. The pensions of children being incumbents shall also be so paid and on the same conditions." The subscriptions were and continued to be paid in rupees, and the pensions were calculated in rupees according to certain Tables.

Subscribers, on being admitted, were required "to promise and engage to submit to, and abide by the rules and byelaws of the Institution" rule 22.

In 1850 when exchange was about par the old rule (33) was repealed under rule 60 which empowered the majority of the Subscribers to alter or amend any existing rule or practice, and the following rule (41) was substituted for it: "That incumbents on the Fund shall be paid their annuities, in India at par, or, in Europe, at the fixed rate of two shillings on the rupee."

On the 1st July 1876 when exchange in remittances from India to England had become adverse, the following rule (50) was passed by a majority of the Subscribers. "That incumbents on the Fund shall be paid their annuities in India in full and incumbents residing in Europe and America may be paid their annuities in London at the rate of exchange fixed for the official year by Her Majesty's Secretary of State for such pensions as are payable at the India House in London. Annuities already due or hereafter becoming due on risks accepted before 1st July 1876 shall be

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payable to incumbents residing in Europe at the fixed rate of t shillings on the rupee."

Exchange having continued to decline, on the 22nd May 1 the Society by the votes of 553 members against 505 passed following rule: "That annuities already due or becoming before the 1st of May 1880 on risks accepted before the 1st J 1876 shall be payable to incumbents residing in Europe or Am at the fixed rate of two shillings to the rupee; but that all annuities due or becoming due shall be paid, if to incumbents India, in full, and, if to incumbents residing in Europe, in Lo at the market rate of exchange."

The plaintiffs were the widow, the son and daughter of F. commenced subscribing to the Fund on the 11th November 1 for the benefit of his widow, on the 18th September 1873 for son and on the 14th November 1874 for the benefit of his daug On the 28th September 1878 F. made a further subscription fo increased benefit for his son. He attended the meeting at w the rule of the 22nd May 1880 was passed but he did not with the majority. On the 25th June 1880 he died having that date duly paid his subscriptions to the Fund.

The plaintiffs who were residing in England now sued for claration that they were entitled to be paid their annuities at rate of two shillings in the rupee notwithstanding the rule o 22nd May 1880.

Held, that under Rule 60 the majority of the Society had power to pass the rule of the 22nd May 1880 so as to affect nominees of all the existing Subscribers, and that therefore plaintiffs with respect to their several pensions were bound by terms of that rule.

THIS was a suit brought by Sophia A. Falle, widow, and infant children of one J. V. Falle against the defendants as Directors for the time being of a Society called the Uncove ted Service Family Pension Fund, the head office of whic at 14 Kyd Street, in Calcutta.

J. V. Falle died on the 25th June 1880 and had a subscriber to the funds of the Society. This suit to have it declared that the defendants were bound unde rules of the Society to pay certain specific sums of mon sterling in London.

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The plaint stated that the Uncovenanted Service Family Pension Fund was a voluntary association of Christian members of the Government Uncovenanted Service, for the purpose of providing, upon certain terms, for the maintenance of the widows and children of the subscribers to the funds of the Society. That J. V. Falle was from the year 1871 and until his death employed in the Government Uncovenanted Service; and on the 11th November 1871, in Calcutta, he applied to be, and was admitted, a member of the Fund for the benefit of the plaintiff, S. A. Falle, his wife; on the 18th October 1873, he was further admitted to subscribe to the Fund for the benefit of his son, the plaintiff P. E. Falle, until the age of eighteen years (the benefit being afterwards, on the 28th September 1870 extended until the age of twenty-one years); and on the 14th November 1874, he was admitted to subscribe to the Fund for the benefit of his daughter, the plaintiff, N. E. V. Falle, until her marriage. That, at the date of the admission of J. V. Falle as a member of the Fund, the terms of admission and membership, and the benefits secured to the widows and children of members were regulated by the following among other rules:—

"22. That every application for admission as a subscriber shall be in the Form A.

FORM A.

To the Secretary Uncovenanted Service Family Pension Fund.

Calcutta,

SIR,

I request to be admitted a subscriber to the U. S. F. P. Fund for the benefit of my as per statement and affirmation enclosed; and I hereby promise and engage to submit to and abide by, the rules and byelaws of the Institution.

I am, Sir,

Your's obediently

(Applicant's signature,)

Designation or Profession.

(Address.)

Dated the 18 .

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25. "That a subscriber wishing to increase the recorded provision for his family, or to provide for his wife or any children not already on the Fund, shall in all respects conform to the rules, and comply with the forms prescribed for observance in cases of original application for admission.

27. "That an admission fee at the following rates be charged on every insurance effected, whether for the first time or in augmentation of any prior risk, *viz.*, for a pension of less than Rs. 50 a month, a fee of Rs. 5, and for pensions of Rs. 50 a month and upwards, a fee equal to ten per cent. upon the amount of monthly pension insured.

32. "That the payments for securing annuities be regulated according to the rates laid down in Tables A, B I, B II, C; payments for the present risks to be undisturbed; that risks which are declared to be not first-class, but which the Directors may nevertheless consider to be reasonably insurable may be admitted on a payment of an addition not exceeding 50 per cent. upon the rates of subscription laid down in the tables. Risks not considered by the Directors to be reasonably insurable shall be rejected.

37. "That in every case of admission or of increased provision, the subscription shall be computed from the date on which such entrance or increase shall be effected. All reductions in the recorded provision shall take effect from the first day of the month following that in which the application may be made.

38. "That an entrance certificate according to form F, after being duly entered on the record of the Fund shall be granted to each subscriber on his admission, bearing the date in which the risk was accepted by the Directors.

Note.—Applicants will be admitted subject to the sanction of the Comptroller-General under the orders of Government. If the Comptroller-General shall refuse to authorize the admission of any person on the ground of ineligibility, the acceptance will be cancelled, and all payments made will be returned, less the medical-fee and stamp-duty on Form D.

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FORM F.

Uncovenanted Service Family Pension Fund.

Entrance Certificate.

Calcutta, _____ 18 .

Certified that Mr. _____ has this day been admitted a member of the Uncovenanted Service Family Pension Fund, under the terms and conditions thereof, for the eventual benefit of the undernamed, and that registry fee (Rs. 7 and his entrance subscription for the month of _____ (Rs. _____) have been duly received by

_____

Accountant and Collector.

Class.	Names.	Date of birth.	Age. Years.	Age. Months.	Where born.	Where resident.	Provision for Nominees. Per Mensem.	Provision for Nominees. Per Annum.	Registered monthly subscription
Subscriber, ...									
Nominee, ...									

All casualties as well as marriage of children must be communicated to the Secretary as they occur.

Registered as No.

_____ } *Directors.*

Secretary.

43. "That subscribers residing in Europe may take their payments to the recognized agents of the Fund in London at an exchange of two shillings to the rupee.

41. "That incumbents in the Fund shall be paid their annuities in India at par, or in Europe at the fixed rate of two shillings to the rupee. It shall be imperative, however, on all widows, incumbents on the Fund, to furnish half-yearly a cer-

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tificate from competent local authority, or from two subscribers to the Fund, of existence and continued widowhood (Form I). A certificate of existence, and where necessary of spinstership also, shall be furnished in the case of incumbents on the Children's Fund (Form J)."

The plaint then stated that this rule was on or about the 1st July 1876, altered as follows :—

50. "That incumbents in the Fund shall be paid their annuities in India in full, and incumbents residing in Europe and America may be paid their annuities in London at the rate of exchanges fixed for the official year by Her Majesty's Secretary of State, for such pension and allowances as are payable at the India House in London and fluctuate with the rate of exchange. Annuities already due or hereafter becoming due on risks accepted before the 18th July 1876, shall be payable to incumbents residing in Europe at the fixed rate of two shillings to the rupee.

53. "That a valuation of the assets and liabilities of the Fund, both in the widows and children's branches shall be made annually by a competent Actuary.

54. "That the surplus capital declared upon the report of the Actuary to exist at the date of such valuation shall form a reserve fund. The interest arising from such reserve fund shall be available for reduction of subscriptions, and such interest accruing annually shall, on the 1st May of each year, be appropriated to the reduction of the subscription for the ensuing year. All subscribers who shall, on or before the 30th April preceding, have completed five years' consecutive payments shall be entitled to share rateably in the reduction according to the amount of their registered subscriptions."

55. "That whenever the surplus capital or reserve fund so declared shall exceed one-third of the net liabilities, the Directors may at their discretion, set apart a portion of such reserve fund not exceeding six per cent. thereof for distribution in further reduction of subscriptions. Such amounts shall be applied in the first instance, so far as may be necessary, to completing the abatement of subscription of all subscribers

titled to shares in the interest under rules 54 to 32 per cent. d the balance or remaining portion thereof shall then be plied in reduction of the subscription for the ensuing year all subscribers who, on or before the 30th April preceding all have completed three years' consecutive payments in the llowing rates :—

Subscribers above 3 years and not exceeding 6 years 1 share.

„	„ 6	„	9	„	2 shares.
„	„ 9	„	12	„	3 shares.
„	„ 12	„	15	„	4 shares.
„	„ 15	„	20	„	5 shares.

The plaint then further stated that the rules, except as ovementioned, remained unaltered until the 22nd May 1880, hen the Society, by the votes of 553 members against 505, rported to pass the following rule.—

"That annuities already due, or becoming due before the 8th May 1880, on risks accepted before the 18th July 1876, hall be payable to incumbents residing in Europe or America t the fixed rate of two shillings to the rupee; but that all ther annuities due, or becoming due, shall be paid, if to cumbents in India, in full, and if to incumbents residing in rope, in London at the market rate of exchange."

Under these circumstances the plaintiffs submitted that rule of the 22nd May 1880 was void and inoperative so as it tended to the detriment of the plaintiffs; that V. Falle, by virtue of his admission as a member of, subscriber to the Fund, and of his subscriptions (which always been duly paid), became entitled to the benefit of Fund according to the rules and regulations at the time as admitted as such member and subscriber; that those fits could not be taken away from him or from the plaintiffs; he rules and regulations could not be altered to his detriment the detriment of the plaintiffs, in as much as the Society or had contracted with the said J. V. Falle for valuable eration to pay to his widow and children on his death spective sums subscribed for in the manner provided for rules and regulations existing at the time he so subscribed t the defendants as Directors of the Fund were bound

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to pay the plaintiffs the respective sums subscribed for in the manner provided by the existing rules and regulations at the time he so subscribed, and in particular to pay such sums in Europe at the rate of 2 shillings in the rupee. These sums it was stated were contracted for as follows :

1. On 11th November 1874 in consideration of a monthly subscription of Rs. 44-8, the Society contracted to pay the plaintiff S. A. Falle, on the death of J. V. Falle, the monthly sum of Rs. 100 in Calcutta, or £10 in sterling in London, at the plaintiff's option.

2. On the 18th October 1873, in consideration of a monthly subscription of Rs. 10-10, the Society contracted to pay the plaintiff P. E. Falle, on the death of J. V. Falle, the monthly sum of Rs. 32 in Calcutta, or £3 4*s.* in sterling in London at his option, until the age of eighteen years; and on the 28th September 1878, in consideration of a further monthly subscription of Rs. 2-5 contracted to continue the said payments to the plaintiff P. E. Falle, until the age of twenty-one years.

3. On the 14th November 1874, in consideration of a monthly subscription of Rs. 11-5, the Society contracted to pay the plaintiff N. E. V. Falle, on the death of J. V. Falle, the monthly sum of Rs. 32 in Calcutta, or £3 4*s.* in sterling in London, at her option, until her marriage. On the death of J. V. Falle, the plaintiffs went to reside in England, and the defendants, on being called upon to pay these sums, refused to do so alleging those that by virtue of the rule of the 22nd May 1880 passed by the majority of the subscribers, the plaintiffs were entitled only to Rs. 100, Rs. 32, and Rs. 32 respectively.

The plaint then prayed for a declaration that the defendants were bound to pay the sums claimed by the plaintiffs in sterling in London, and that the defendants might be directed to pay them.

The defendants, in their written statements stated that the object of the Fund as stated in rule 2 of the Rules of the Fund, was " to provide for the maintenance of the widows and children of those who shall subscribe to it upon the terms and conditions specified below, or such others as may be determined

upon by the subscribers, or by a majority of them;" or that, so far as the deceased J. V. Falle was admitted to subscribe to the Fund on the 28th September 1878, in respect of the plaintiff P. E. Falle, on the 28th September 1878, the application to become such subscriber, and the admission to be such subscriber, was, under rule 25, a distinct matter from any previous application for admission of the deceased as a subscriber to the Fund. that the altered rule 50 was in force at the time the deceased applied to be, and was admitted as a subscriber to the Fund for the benefit of the plaintiff P. E. Falle; that rule 41 was passed in 1850 in place of, and substitution for, the old rule (33), of the Fund which was as follows:—

33. "That widows, being incumbents on the Fund shall be paid their pension at any place they may desire, either monthly, quarterly, or half yearly, subject to the usual charges of remittance. The pensions of children, being incumbents, shall also be so paid, and on the same condition, at the request of their guardians. It shall be imperative, however, in all widows, incumbents on the Fund, to furnish half-yearly a certificate from competent local authority, or from two subscribers to the Fund, of existince and continued widowhood; a certificate of existence and where necessary, of spinstership also, shall be furnished in the case of incumbents on the children's Fund."

That at the time of the passing of rule 41, the rate of exchange between England and India was variable, in favour sometimes of silver and sometimes of gold, and the rule was passed to avoid the trouble of paying in England a slightly different sum each month to each incumbent, as an equitable rate at a time when the value of a rupee and of two shillings was, roughly speaking, equal, varying occasionally in favour of England, and occasionally in favour in India; that the rule which was passed on the 22nd May 1880, by the votes of the majority of the subscribers to the Fund, was passed under the power conferred upon the subscribers to alter or amend any existing rule of the Fund by rule 60, which was as follows:—

60. "That it shall be competent to any twelve qualified subscribers who may be dissatisfied with any proceeding of the

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Directors, or who may be desirous of altering or amending any existing rule or practice, or of making any proposition with regard to the Fund, to require the Directors, by a written requisition, to call a special meeting of subscribers and such meeting shall thereupon be called by the Directors. Notice of the object of such meeting shall be given by the Directors in two of the principal newspapers of Calcutta and the Government *Gazette* four weeks before the time appointed. It shall be essential to the validity of such meeting that not less than fourteen subscribers other than the requisitionists and Directors shall be present thereat. The meeting shall determine whether the question shall be submitted by Circular to the general body of subscribers or not; if the former, the Directors shall circulate it accordingly, and the votes of the majority of the subscribers received within three months from the issue of such Circular shall be decisive."

The defendants further stated that the deceased J. V. Falle himself voted in respect of the passing of the rule of the 22nd May 1880; that the rule was a binding rule passed because it was found that the relative value of gold and silver and the conditions of the members whose families were to be provided for by the Fund had so altered, as that the loss to the Fund by exchange in paying pensions of incumbents in Europe at the rate of two shillings to the rupee rose from the sum of Rs. 4,246 in the year 1871-72 to the sum of Rs. 40,583 in the year 1878-79 and such loss threatened to increase as each new incumbent for many years came on the Fund, and it was found that such loss might seriously injure the stability of the Fund; and because the paying of the said pensions at the said rate of exchange was conferring an undue advantage on one class of subscribers to the Fund at the expense of another class of subscribers, besides disturbing seriously the subscription tables of the Fund, which were made after due deliberation and fixed certain proportions between the rates of payment and the pensions secured, both being expressed in Indian money, and which tables formed the basis of contract with every subscriber as shown by the Entrance Certificate, which declares the pension payable to be in Indian money, and even directly alludes (as in the form for children) to the tables in question.

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The defendants therefore submitted that the correct meaning of the words of rule 2 was, that the Fund was intended to provide upon the terms and conditions contained in the subsequent rules of the Fund, or in such other rules as might be determined upon by the subscribers or a majority of them, for the maintenance of the widows and children of those who might subscribe to the Fund; that the rule of the 22nd May 1880 in respect of which the deceased J. V. Falle and himself voted was valid is a good and valid rule, and such a rule as the subscribers had full power and authority to make and pass; and such rule was and is binding on the deceased and on all who were subscribers to the Fund at the date of the passing of the said rule who had become subscribers since the passing of the rule; and that it was one of the rules and conditions of the Fund under which the Fund agreed to provide for the plaintiffs as the widow and children of the deceased. The defendants further submitted that the rule of the 22nd May 1880 was a good and valid rule of the Fund at the date of the death of J. V. Falle and at the date when the plaintiffs became entitled to the benefit of the Fund; and that the plaintiffs were not entitled to claim payment of the respective pensions due to them otherwise than under the rules of the Fund at the date they became so entitled, and therefore were not entitled to claim to be paid their respective pensions at the rate of two shillings to the rupee, or any other rate than that provided by the rule of the 22nd May 1880.

Kennedy and *Phillips*, for the Plaintiffs.

Branson and *Evans*, for the Defendants.

Kennedy:—No alteration in the value of money can be allowed to affect the contract entered into by the deceased J. V. Falle, however unjust circumstances may render a continuance of the old rule under which he contracted.

[GARTH, *C. J.*:—Then what was the alteration provided for by rule 60 intended to be?]

Any alteration under that Rule could only apply to future subscribers. If the language of the Rules were sufficiently clear it might be difficult to contend that the subscribers were bound by any change made, but the true construction of the

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rules is that each subscriber is entitled to have the rules applie to his contract which existed at the time of his entering th Society.

[GARTH, *C. J.*:—But one of the rules of the Society is tha the rules may be changed.]

Yes, but not so as to entirely alter existing contracts.

[PONTIFEX, *J.*:—The question seems to be whether th change which has been made has been honestly made. If change were made in the rules which would be manifestly unju the Court would not allow it to stand. But the change he was made for the purpose of preventing injustice.]

A subscriber I submit cannot be bound by any byelaw pass without his consent, see May's Law of Insurance, 687. In t case of the *Secy. of State* v. *Underwood*, L. R., 4 E. & J. App., 58 Lord HATHERLEY says, a rule must be wonderfully clear th could allow the majority to confiscate the rights of the minori

[PONTIFEX, *J.*:—The observation of Lord HATHERLEY do not apply here. The case there was very different.]

The rights of the minority will be protected against t power of the majority, *Menier* v. *Hooper's Telegraph Co.*, L. I 9 Ch., App., 350. The true construction of Rule 60 is that oth rules may be made, and that these rules shall be liable to chang

In the case of *E. I. Co.* v. *Robertson*, 12 Moo. P. C., 400 t rules which were construed were very much clearer than t rules here.

[PONTIFEX, *J.*:—Lord HATHERLEY's remarks are against yo See pp. 589-90 commencing "But how as to the future, &c He then says "That is a rule which might well be passed Now that is exactly the rule which has been passed here.]

There the rules were the only contract, which is not t case here. Besides there the person contesting the rule h actually assented to it.

In the *Secretary of State* v. *Underwood*, L. R., 4 E. and App., 580, at p. 589, Lord HATHERLEY says, "No rules unl the expressions were insuperably the other way would ever so construed as to enable a majority having an interest direc opposed to the vested interest of a minority to confiscate t interest."

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[PONTIFEX, *J.* :—But Falle had no vested interest.]

Phillips (on same side) :—This being a Society for insuring a provision for widows and children, it was important that each subscriber should be certain what amount his widow or children would be entitled to on his death, and for that reason the rule assessing the value of the Rupee at two shillings was resolved upon.

There is nothing in the rules empowering the Society to change the conditions upon which any subscriber had already contracted, *Edwards* v. *Warden*, L. R., 9 Ch., App. 495.

Branson was called upon by the Court.

[PONTIFEX, *J.* :—The case made by the other side goes beyond the cases cited. It would put Falle in a better position than any of the subscribers in India. That would be *extra vires*. The rule having ceased to be, as it was intended, a mere rule of convenience, it was right that it should be set aside.]

Branson :—The rules can clearly be altered so as to affect Mr. Falle. The case here does not come within the meaning of Lord Hatherley's observations in *Underwood's* case.

Falle was admitted under the rules of the Society and he engaged to be bound by such rules (see 22). These rules a majority of the subscribers had power to alter and they have altered them.

Evans followed on the same side.

Kennedy having been heard in reply the Court took time to consider its judgment.

On the 7th March the following judgment of the Court (1) was delivered by—

PONTIFEX, *J.*

PONTIFEX, *J.* :—This case, although exceedingly important to the subscribers to, and pensioners upon the Uncovenanted Service Family Pension Fund, does not appear to us to be one of much difficulty.

The Fund was established many years ago for the purpose of securing a provision for the widows and children of its members.

(1) GARTH, *C. J.* and PONTIFEX, *J.*

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PONTIFEX, J.

Originally, or at all events prior to 1850, the rule (then being No. 33) as to payments of pension was as follows:—

"That widows being incumbents on the Fund shall be "paid their pensions at any place they may desire either "monthly, quarterly or half-yearly subject to the usual charges "of remittance. The pensions of children being incumbents "shall also be so paid and on the same condition."

The subscriptions were and continued to be paid in rupees, and the pensions are calculated in rupees according to certain tables.

It is clear of course, that the tables would be untrustworthy and deceptive guides, if the subscriptions were paid in a lower and the pensions in a higher standard of currency.

In the year 1850, exchange being then somewhere near par, the old rule 33 was repealed by a general meeting and a new rule 41 was substituted for it. The new rule was as follows:—

"That incumbents on the Fund shall be paid their annui- "ties in India at par, or in Europe at the fixed rate of 2 shil- "lings to the rupee."

This alteration must have been made under Rule 60 of the Society which is as follows:—

"It shall be competent for any twelve qualified subscribers "who may be dissatisfied with any proceeding of the Directors, "or who may be desirous of altering or amending any existing "rule or practice or of making any proposition with regard "to the Fund" to require the Directors to call a special meeting. The meeting shall determine whether the question shall be submitted by circular to the general body of subscribers or not; if the former, the Directors shall circulate it accordingly, and the votes of the majority of the subscribers received within 3 months from the issue of such circular, shall be decisive.

If rule 41 was passed by the votes of a majority of the subscribers in substitution for the old rule 33, it was of course competent for a majority of the subscribers by their votes duly recorded to alter it.

As Lord WESTBURY puts it in the case of the *Secretary of State for India* v. *Underwood*, L. R., E. and I. App., 605,

"if it was competent to them to make that addition (in this case alteration) "then by the clear interpretation of the 30th "rule by which that authority was given, there was equal "authority to take it away."

But the question in this case is not whether the Society could revoke rule 41 which they passed in 1850, but how far they could revoke it so as to bind existing subscribers to the Fund.

What they really did was as follows:—

When in 1876 adverse exchange began to tell, the following rule, then numbered 50, was on the 1st of July 1876 passed by the votes of a majority of the subscribers.

"Incumbents on the Fund shall be paid their annuities in India in full, and incumbents residing in Europe and America may be paid their annuities in London at the rate of Exchange fixed for the official year by Her Majesty's Secretary of State for such pensions and allowances as are payable at the the India House in London and fluctuate with the rule of Exchange. Annuities already due, or hereafter becoming due on risks accepted before the 1st of July 1876, shall be payable to incumbents residing in Europe at the fixed rate of 2 shillings to the rupee."

It was thus attempted, though it seems to us with questionable wisdom or fairness to preserve what I suppose were regarded, but in my opinion improperly regarded, as the vested interests of those existing subscribers. Exchange, however, continuing to decline, until at one time there was actually a depreciation of 25 per cent. from the valuation of the rupee at 2 shillings, it was considered that further steps were necessary for the security of the Fund, and on the 22nd of May 1880 the Society by the votes of 553 members against 505 passed the following rule:—

"That annuities already due or becoming due before the "1st of May 1880 on risks accepted before the 1st of July 1876, "shall be payable to incumbents residing in Europe and "America at the fixed rate of two shillings to the rupee, but "that all other annuities due or becoming due shall be paid if "to incumbents in India at full, and if to incumbents residing in "Europe or America, in London, at the market rate of ex-"change."

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The question we have to determine is whether this new rule is binding on the widows and children of subscribers who were members of the Society before the 1st of July 1876 and who died after the 22nd of May 1880.

For John Vernon Falle, the husband of the plaintiff, Sophia Anne Falle, and father of the infant plaintiffs, commenced subscribing to the Fund on the 11th of November 1871 for the benefit of his widow; on the 18th of September 1873 for the benefit of the plaintiff Philip Erskine Falle, and on the 14th of November 1874 for the benefit of the plaintiff Nora Eliza Vernon Falle. On the 28th of September 1878 he made a further subscription for an increased benefit to the plaintiff Philip Erskine Falle, but it is not disputed that this last subscription must be governed by the rule passed in 1876.

Mr. John Vernon Falle attended the meeting at which the rule of the 22nd May 1880 was passed, but it is admitted that he did not vote with the majority.

Mr. John Vernon Falle died on the 25th June 1880 having up till then duly paid his subscriptions to the Fund.

His wife and children, the plaintiffs, are now residing in England and claim to be paid their pensions in England at the rate of 2 shillings to the rupee notwithstanding the existence of the rule passed by the majority of the subscribers on the 23rd of May 1880.

Their case is, that Mr. Falle contracted on the footing of rule 40 of 1850; that it was out of the power of the Society to vary the terms of that contract either by passing a rule or otherwise, whatever might be the depreciation of exchange.

Their argument is, that if exchange had risen, so that the rupee had become of greater value than 2 shillings—a state of circumstances which existed not so very long ago, though to us it sounds like a fable of the golden age—the loss would have been theirs, and that therefore now they are entitled to insist upon the benefit. But this is scarcely an argument, it is rather a begging of the question.

They then argue that it is impossible to say whether Mr. Falle would have become a subscriber to the Fund if he had known that persons in England were to be calculated at less

han 2 shillings to the rupee. This is, in other words, to argue iat Mr. Falle would not have joined the Fund, unless an advan- ige was secured to his nominees which would be unfair to idian nominees and most of his fellow subscribers. But as a atter of fact we do know that Mr. Falle increased his sub- ription on the 28th of September 1878 although at that time ie 2 shilling rule had been abrogated so far as respected risks ccepted after the 1st of July 1876.

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Rule 33 which was in existence prior to 1850 was a rule hich dealt with perfect fairness with all classes of Pensioners, ndian and foreign; though under it troublesome calculations ight become necessary in payment of each English pension. s a matter of convenience, and to save constant trouble of alculation, it was no doubt in the Society's power to alter as they did in 1850, provided they gave no class of Pensioners n undue advantage. But that a majority should give an ndue advantage to any class would be in our opinion *extra ires* and open to correction. As Lord Hatherley said in the ase already cited (p. 588), "The power of making general rules must surely be one of making rules that operate equally on all subscribers; as for instance any general change in the rate of percentage, or of contribution or the like." he plaintiffs, however, rely on certain other observations of ord Hatherley in the same case when he says (p. 589) "No rules (meaning powers to effect changes by the resolution of a majority) unless the expressions were insuperably the other way, would ever be so construed as to enable a majority having an interest directly opposed to the vested interest of a minority, to confiscate that interest." But when the rule 1880 was passed by a majority, Mr. Falle cannot in our inion be said to have had any vested interest in the proper ceptation of the term. Nor could it be said that the majority d an adverse interest to the minority, for it was impossible the time the rule was passed to predicate whether Mr. Falle any other member of the minority would be prejudiced or uld benefit by it. If Mr. Falle had lived for some years ter the passing of the rule, he would probably have benefited it. As it happens he died shortly after the rule was passed,

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but the result of the rule is to place his nominees in the same and no worse position than the nominees of any other existing members of the association at the time the rule was passed. To quote Lord Hatherley again at page 590 of the case already cited, "Those who have not yet paid an excess might all be "held to be in an equal position, regard being had to their "chances of life," and further "I think a rule might well "be passed that saving the rights of all who have contributed "in excess of the one half value of the annuity, no further "refund shall be allowed."

It seems to us therefore that even Lord Hatherley, the dissentient Judge in the case cited, would have agreed that the nominees of all the shareholders in existence at the date of passing the new rule would be bound by it. And it is clear that the other Judges, Lord CHELMSFORD, Lord WESTBURY and Lord COLONSAY would have been of that opinion.

But apart from authority, common sense would lead us to the same result.

This was a Society intended for the equal benefit of all its subscribers, Mr. Falle in becoming a subscriber can scarcely be supposed to have intentionally subscribed on a footing unjust and prejudicial to a large number of the other subscribers.

Rule 41 of 1850 was itself a rule of adjustment, and its very existence was notice of the necessity of adjusting Indian and English payments for pensions. The existence of tables in which pensions were calculated in rupees, and the reference to them in the rules, was further notice that a pension payable in England was calculated on precisely the same data as a pension payable in India; and ought therefore to be of precisely the same value, subject only for convenience sake to some easy and ready rule of adjustment; and so long as exchange had but slight variations under or over par, the 2 shilling rule was a roughly convenient one. In a Society of this kind if pensions are for the convenience of certain nominees allowed to be paid out of India, it seems to us absolutely necessary that there should be a continuous power to adjust payments in accordance with the true rate of exchange. The 60th rule seems to us sufficiently wide to confer that power.

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and the fact that the Society failed for some years to make some adjustment does not in our opinion disable them from at any time afterwards putting all the subscribers on an equality. Indeed this being an Indian Society, and the subscriptions being payable in India in rupees, we see no reason to prevent a majority of the subscribers from passing a rule that all pensions should be payable exclusively in India. For the rule allowing pensions to be paid elsewhere is simply a rule of convenience.

If the Society could not make adjustments in accordance with the rate of exchange, or refuse to pay pensions out of India, the result might be that the existing subscribers would decline to continue to contribute for what, according to the actuarial calculations upon which the operations of the Society are founded, would be such evidently unfair results. Indeed according to the strict interpretation of rule 41 of 1850, and as between competing pensions, it might be difficult to hold that all pensioners entitled before the 1st of July 1876, even though they might reside in India, could not demand payment to be made to their agents in England at the rate of 2 shillings to the rupee. For it is to be observed that rule 41 of 1850 makes no mention of "residence." Rule 33 for which it was substituted, speaks of payment at any place pensioners might desire' and rule 50 of 1876 is the first to use the word "residing," though curious enough the latter part of the rule omits all reference to incumbents residing in America.

This, however, might be so seriously detrimental to existing subscribers as to involve the collapse of the Society; and it would of course have been equally detrimental to Mr. Falle, if he had continued to live.

If therefore the terms of Rule 60 were not as wide as they are, it seems to us that for the purpose of continuing the business of this association it would be necessary, if pensioners are to be paid out of India, to imply a power to make such adjustments as equal fairness might require.

But when we see what was the description of the Society to which each subscriber elected to become a member, *viz.*, the description contained in its second rule, stating the object of

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the Society to be "to provide for the widows and children of those who shall subscribe to it, upon the terms and conditions specified below, or such others as may be determined upon by the subscribers or by a majority of them," when we refer to the terms upon which Mr. Falle entered into his so-called contract, namely, his request to be admitted a subscriber, and his engagement "to submit to and abide by the Rules and byelaws of the institution," when we consider the terms of some of these rules, as for instance, Rule 27, which requires the payment by subscribers of "a fee equal to ten per cent. upon the amount of monthly pension insured;" and particularly when we further consider the terms if its 60th rule, it seems to us beyond all question that a majority of the Society had full power to pass such a rule as was passed on the 22nd of May 1880, so as to affect the nominees of all the existing subscribers; and beyond this, for the purposes of this case, it is not necessary to go.

We are therefore of opinion, that the plaintiffs are with respect to their several pensions bound by the terms of the rule passed on the 22nd of May 1880, and that this suit should be dismissed with a declaration to that effect. This being a representative case, and the defendants not pressing for costs, we think the suit should be dismissed without costs.

[CIVIL APPELLATE JURISDICTION.]

1881.
March 4th.

No. 2487 of 1879.

OHIMONI DABI (ONE OF THE DEFENDANTS) ... APPELLANT;

AND

AMIRUDDIN AND OTHERS (PLAINTIFFS)..... RESPONDENTS.

econd Appeal—Civil Procedure Code, Act X of 1877, *section* 578 *—Judgment, Omission by Judge to state reasons for—Error of law.*

In a suit to recover possession of certain immovable property alleged to have been purchased by the plaintiff from a Hindu widow who claimed to have held the same as heir of her husband, the defendant who was the mother of the husband contended, *inter alia*, that the alleged purchase and sale were invalid by reason that she herself was entitled to maintenance out of the property. The first Court gave the plaintiff a decree and this decree was affirmed on appeal by the District Judge, who however gave no reasons of his own for his judgment but merely adopted those of the lower Court.

Held, that having regard to the nature of the case and the simplicity of the point for determination, the fact of the District Judge having omitted to state his reasons did not amount to such an error of law within the meaning of section 578 of the Code of Civil Procedure as affected the merits of the case or the jurisdiction of the Court.

APPEAL from a decree of the District Judge of Moorshedabad, ated the 7th August 1879 affirming the decree of the 2nd oonsiff of Berhampore, dated the 30th December 1878.

This was a suit to establish title to certain land and for mages for the loss of rent for the year 1284. The plaintiff leged that he purchased the lands in question from the fendant Huro Sundari, the widow of one Bonomali Chatterji, the 25th Magh 1283 and obtained possession; that in Falgoon 83 he settled the land with the defendant Khadu Sheikh at rental of 45 Rs.: that the defendants Rohimoni Dasi (the incipal defendant in the suit) and Okhoy Chunder Ghose in

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Statement.

collusion cut away the paddy grown by Khadu Sheikh and had taken possession of the land.

Rohimoni Dasi denied that the plaintiff had ever obtained possession and alleged that the purchase on the 25th Magh 1283 was not a real transaction: that the plaintiff's vendor had never been in possession and had no interest in the land and that she, Rohimoni Dasi had been herself in possession for more than 12 years; that Bonomali the husband of the plaintiff's vendor was her son, and had made over to her all his property, movable and immovable. She further alleged that the property in question was charged with her maintenance and could not therefore be legally transferred by Bonomali's widow to another.

The Moonsiff held that the alleged sale to the plaintiff was real; that Rohimoni had not proved the alleged gift from Bonomali; that Rohimoni had not been in exclusive possession for 12 years, and that even if the property were charged with the maintenance of Bonomali's mother, the sale to the plaintiff was not therefore void.

He found also that the plaintiff had obtained possession upon the purchase being effected.

He accordingly gave the plaintiff a decree for the relief which he claimed.

On appeal the District Judge passed the following judgment.:

"The Moonsiff's judgment shows that he fully considered this case. The plaintiff claims by purchase from the undisputed heir into law by the widow.

The mother failed altogether to establish any *status* to impeach the purchase in this case. I think the Moonsiff's decision was correct and I dismiss the appeal without costs."

Rohimoni appealed to the High Court on the ground that the District Judge had not stated his reasons for his decision, or recorded his findings on the various issues, and that the sale to the plaintiff was invalid.

Baboo *Gopal Chunder Sircar*, for the Appellant.

Moonshee *Mahomed Yusuf*, for the Respondent.

The judgment of the High Court (1) was as follows :—

We think there are no grounds for this appeal.

We are far from saying that the judgment of the District dge is in a form which we approve; on the contrary we con- er that he ought to have taken more pains to explain his n views, instead of merely saying that he adopts those of moonsiff; but considering the nature of the case, and ring regard to the fact that the point is a very simple one, think it impossible to say, that the fact of the judgment ng so short amounts to such an error of law, as (within the aning of section 578 of the Code) affects the merits of the e, or the jurisdiction of the Court.

It appears from the judgment that there were only three unds of appeal: 1st, limitation, 2ndly, waiver, and 3rdly, that sale was invalid. The two first points have not been taken this Court at all. The third is the only one which has been ued here, and that relates to the validity of the sale that s made by the widow of Bonomali to the plaintiff. The ly ground for invalidating that sale was that the defendant 1 the mother of Bonomali, was entitled to her maintenance of the property; and for that reason it is said that the low had no right to sell the property.

Now that is a very simple point, the moonsiff thinks there othing in it; and the learned pleader who has argued the e here, admits that so far as he is aware, there is no autho- to support his argument.

We think that the plaintiff is entitled to the possession of roperty sold, although as against him, another suit may bly be brought for enforcing as against the plaintiff the of the defendant No. 1 to maintenance.

We have been referred to a case reported in 1 Law Review, cided by Justices WHITE and MACLEAN, (which appears e involved complicated questions of law and fact) and those learned Judges thought it right to remand in order he Judge in the Court below might give a judgment in accordance with the law explanatory of his reasons for g with the moonsiff.

(1) GARTH, *C. J.* and MCDONELL, *J.*

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Without questioning the property of this decision, we think it impossible to say in the present case that the fact of the Judge having omitted to state his reasons fully, where the point lies in such a small compass as it does here, would justify us in interfering with the judgment in second appeal.

The appeal is dismissed with costs.

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Act VIII (B. C.) of 1869, sections 61 and 64—*Rent, Execution of decree for, by sale of under-tenure.*] It is only where the judgment-debtor is in receipt of the entire 16 annas' share of the rent, that in execution of a decree for rent, the under-tenure can be sold. *Rai Dwarkanath Chakravuti* v. *Rai Sureidra Nath Chowdhuri* 407

Act VIII *(B. C.) of* 1869, *suit for rent at rate fixed by Collector—Act VI (B. C.) of* 1862, *Proceedings of Collector under—Void proceedings under Act VI (B. C.) of* 1869, *Sec.* 10, *whether binding on Civil Court.*] In a suit for arrears of rent under Act VIII (B. C.) of 1869 claimed at a rate fixed by the Collector under section 10 Act VI (B. C.) of 1862, it appeared that the proceedings held before the Collector were *ultra vires*, irregular and beyond his jurisdiction. *Held*, that although there had been no appeal preferred against the decision of the Collector, the Civil Court was not bound to recognize his proceedings. *Rupennessa Bibi Chowdhrani* v. *Abeduddin Mahomed* 73

Act VI (B. C.) of 1873. See RIPARIAN EMBANKMENT 553

—— VII (B. C.) of 1878, Sections 9, 58 and 74—*"Like offence" under Section* 74 *of Act VII (B. C.) of* 1878—*Presidency Magistrates Act, IV of* 1875, *Section* 12—*Previous conviction under Excise Act.*] To constitute an offence under section 58 of Act VII (B. C.) of 1878, it is necessary that the accused should, without a special license from the Collector, have introduced, or attempted to introduce for sale spirituous liquors manufactured at another place within limits which have been fixed under section 9 of the Act, for the consumption of liquors manufactured at a distillery established within such limits. The words "like offence" in section 74 mean any offence under the Act, punishable with a fine of Rs 200 or upwards—not necessarily the "same offence." *Ram Chunder Shaw, In the matter of* .. 250

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Section 58. See ACT VII (B. C.) of 1878 SECTION 9 250
Section 74. See ACT VII (B. C.) of 1878 SECTION 9 250

—— VII (B. C.) of 1878, *section* 60—*Wholesale, Sale of liquors by—Exciseable liquors, Sale of—Assortment.*] A licensed retail vendor of exciseable liquors being the only person liable to the penalty provided by Section 60 of Act VII (B. C.) of 1878, the servant of such a vendor is not liable to conviction under that Section. Quaere: Whether a sale of 12 quarts of beer and 3 bottles of brandy is a sale of an assortment of spirituous liquor, and comes within Section 15 of the Act. *Empress* v. *Nudhiar Chand Shaw* 162

Act VII (B. C.) of 1879, section 7. See ACCRETIONS TO UNDER-TENURES 517

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Arbitrators, Application by for sanction of Court as to costs—*Reference—Civil Procedure Code, Act X of* 1877, *Chap. XXXVII*] The Court has no power under the provisions of the Code of Civil Procedure to sanction an order passed by the arbitrators to whom a matter has been referred, making the payment of their fees a condition precedent to their hearing the reference. *Robarts* v. *Steel* .. 439

Armenian widow, Right of to Dower. See DOWER 78

Arrears of Rent, Suit for—*Act VIII (B.C.) of* 1869, *Section* 14—*Rent payable for previous year—Proper Rent—Res Judicata—Rent, Decree for, at particular rate, whether binding for subsequent years.*] In a suit for arrears of rent for the years 1283-4-5 at the rate of Rs. 2 per bigha, it was objected that the plaintiffs had previously obtained a decree in respect of the same land against the defendant for the years 1281 and 1282, at the rate of 15 annas per bigha, and that they could not now claim at a higher rate, but it appeared that in that suit the Court did not find what was the *proper rent* payable by the defendant, but had merely given a decree at the rate admitted by him to be payable. *Held*, that though the decree as to rent of the years 1281 and 1282 was binding between the parties as to the rent of these years, it in no way estopped the plaintiffs in the present suit from proving the proper rate of rent for the years 1283-4-5. *Punnu Singh* v. *Nirghin Singh* 310

Artificer. See ACT XIII OF 1859 SECTION 2 254

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Attachment before Judgment. See INSOLVENCY 213

——— of Property. See CIVIL PROCEDURE CODE, ACT X OF 1877, SECS. 272 AND 277 17

——— of Surplus and on proceeds. See REG. VIII OF 1819, SECTION 17, CL. 5 341

——— See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 260 487

——— whether subsisting—*Mortgage Lien—Execution proceeding, "Struck off"—Priority.*] An application for execution of a simple money decree having been made on the 6th December 1873, and fresh attachment made thereon in terms of an arrangement between the judgment-debtor and the decree-holder, the proceedings were on the 31st December 1873 stayed for a month, and the execution case was by an order "struck off for the present," the judgment-debtor undertaking not to alienate certain property in the mean time. Nothing was done by the decree-holder until the 30th November 1874, when a fresh application for attachment and sale was made. On the 2nd February 1874, the judgment-debtor had mortgaged the property in question. *Held*, that on that date there was no subsisting attachment, and that from that time the mortgage lien attached to the property. *Gungagotti Pal* v. *Ram Sundur Dut* .. 157

Attempt to commit forgery. See PENAL CODE, ACT XLV OF 1860, SECTIONS 465 AND 464 572

——— ——— an offence. See PENAL CODE, ACT XLV OF 1860, SECTIONS 463 AND 464 572

Attorney and Client, Costs as between. See MORTGAGE, REDEMPTION OF .. 437

Attorney, construction of Power of—*Mortgage or sell, Power to—Bond.*] A granted a power of attorney authorizing certain persons "to sell or mortgage any portion of my estate at their discretion for the payment of my debts." *Held*, that the instrument did not authorize the execution of a simple money bond. *Purna Chunder Sen* v. *Prosunno Cumar Dass* .. 443

Auction-Purchaser. See CIVIL PROCEDURE CODE ACT X OF 1877, SECS. 293 AND 316 41

Award—Act VIII of 1859, section 325 —*Irregularity—Appeal from judgment on award.*] There is no appeal from a judgment under section 325 of Act VIII of 1859 upon an award. *Maharajah Jog Mungul Singh* v *Mohun Ram Marwaree*. 23 W. R. 429; *Gunga Narain Ghose* v. *Ram Chand Ghose*. 12 B L. R., 48; and *Boonjad Mathoor* v. *Nathoo Shahoo*, I. L. R., 3 Cal., 375, distinguished, *Wazir Mahton* v. *Lubt Singh* 505

Benefit Society, Power of Subscribers to alter rules of. See MUTUAL BENEFIT SOCIETY 577

Bengal Civil Courts Act, VI of 1871. See CONTRACT ACT, X OF 1872, SECTION 265 329

Bill of Sale. See GIFT, DEED OF .. 441

Bond—*Covenant not to alienate—Mortgage Lien.*] A by a bond covenanted "not to alienate the property of himself and his daughter for which he was about to sue, or the rest of his own property until the loan secured by the bond was paid off." *Held*, that the bond did not operate as a mortgage by A. *Rajkumar Ramgopal Narayan Singh* v. *Ram Dutt Chowdhry*, 5 B L. R., 264 distinguished. *Gunoo Singh* v. *Latafut Hossein*, 1 C. I. R., 91 followed. *Sheikh Nosibulla* v. *Sheikh Naser Mistri* 454

Bond. See ATTORNEY, CONSTRUCTION OF POWER OF 443

Breach of Peace, Dispute likely to give rise to. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 530 .. 514

——————— See CRIMINAL PROCEDURE CODE ACT, X OF 1872 SECTION 530 217

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Cause of Action. See EASEMENT .. 375

Causes of Action, Joinder of. See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 43 297

Certificate of non-satisfaction of Decree, Objection to jurisdiction of Court to grant. See EXECUTION OF Decree 261

Channel, Right of passage over. See EASEMENT.. 375

Civil Court, order by, under Section 471 of the Criminal Procedure Code Act X of 1872—*Appeal—Procedure.*] Where a Civil Court directs an enquiry to be made by the Magistrate of the District under Section 471 of the Criminal Procedure Code in respect to the Evidence given by the witnesses in a case before it, the High Court cannot as a Civil Court on Appeal interfere. See *Reg.* v. *Banjo Lall*, I. L. 1 Cal., 450. *Umbica Sundari Chowdhrain* v. ***Ajitulla Mondul*** 148

Civil Procedure Code, Act X of 1877, Chap. XX. See INSOLVENT ACT .. 14

Civil Procedure Code, Act X of 1877 Chap. XXXVII. See ARBITRATOR, APPLICATION BY, FOR SANCTION OF COURT AS TO COSTS 439

Civil Procedure Code, Act X of 1877, *Section* 12—*Res Judicata.*] Pending the final hearing in appeal of a suit for confirmation of possession of certain land, and for the recovery of the produce of such land alleged to have been carried away by the defendants, the plaintiff brought a suit again asking for confirmation of possession, but also for the recovery of the produce which had arisen since the institution of the other suit. *Held*, the second suit so far as it sought for the recovery of the produce was not barred by the first suit. *Bissessur Singh* v. *Gunput Singh* .. 11

Civil Procedure Code, Act X of 1877, section 13—*Ex-parte Decree, whether final—Final Decree.*] An *ex-parte* decree is not final within the meaning of Explanation IV, section 13, of the Civil Procedure Code, Act X of 1877, so long as it is open to the Court on the application of the parties to modify it. *Nilmoni Singh Deo* v. *Hira Lal Das* 257

Civil Procedure Court, Act X of 1877, section 13. See RES JUDICATA .. 711

Civil Procedure Code, Act X of 1877, section 13, Expl. II.—*Res Judicate—Decree for arrears of rent at particular rate, whether a bar to suit for abatement—Abatement—Act VIII (B. C.) of* 1869, *section* 19.] In a suit for arrears of rent the landlord proved a juma-bundi signed by the defendant admitting the area of the lands held and the rent payable to be as claimed by the plaintiff, and a decree was accordingly passed for the amount of arrears claimed, no further evidence being taken as to the extent of the land. Subsequently the tenant filed a suit against the landlord alleging that he actually held a less area than that in respect of which he had been paying rent, and claiming the right to have the land re-measured and to pay rent in accordance with such re-measurement. *Held*, that the question in the latter suit was not *res judicata* by the decision in the former suit. *Per* FIELD, *J.*:—Section 19 of Act VIII (B. C.) of 1869, which provides that a ryot having a right of occupancy shall be entitled to claim an abatement of the rent previously paid by him if the quantity of land held by the ryot has been proved by measurement to be less than the quantity for which rent has been previously paid by him, is peculiarly applicable to a case in which rent is paid at so much per bigha or other local unit, and where rent is so computed and paid, the ryot is entitled to have a measurement at any time, and if the result of such measurement shows that he holds less than he has been paying for, he is entitled to an order for abatement which will have a prospective effect. *Kedar Nath Mondul* v. *Jugutbundhu Bose* .. 33

Civil Procedure Code, Act X of 1877, section 13. Expl. See RES JUDICATURE 10

Civil Procedure Code, Act X of 1877, section 31. See PARTIES .. 457

Civil Procedure Code, Act X of 1877, section 43, Illustration—*Causes of Action, Joinder of—Omission to sue for entire amount of rent due.*] The authority of the decisions in the cases of *Raja Sutto Churn Ghosal* v. *Obhoy Nund Doss*, 2 W. R. Act X Rul., 31, *Ram Soondur Sein* v. *Krishna Chunder Goopto*, 17 W. R., 380 and of *Kristo Kinkur Poramanick* v. *Ram Dhun Chettangia*, 2 W. R., 326 has been swept away by the provisions of section 43 of Act X of 1877. There is no distinction so far as section 43 of Act X of 1877 is concerned between a suit omitting to claim an earlier rent and a suit omitting to claim a later rent due at the date of the institution of the suit. *Taruk Chunder Mukerji* v. *Panche Mohini Dabi* 297

Civil Procedure Code, Act X of 1877, sections 182 and 183. SEE PERJURY IN RESPECT OF EVIDENCE IN CIVIL COURT 292

Civil Procedure Code, Act X of 1877, section 210. See LIMITATION UNDER ACT VIII (B. C.) OF 1869, SECTION 58 .. 409

——— sections 230, 245 and 248. See LIMITATION ACT, XV OF 1877, SCHED. II, ART. 130 23

Civil Procedure Code, Act X of 1877, section 234—*Legal Representation of deceased judgment-debtors—Hindu Widow, Decree against.*] A suit by a widow as representative of her deceased husband's estate to recover possession of certain property, the next heirs of her husband being made defendants as having some interest in the property in question, was dismissed with costs. The widow having died, the defendants sought to execute the decree against the next heir of the husband. *Held*, that the next heirs were the "legal representatives" of the widow within the meaning of Sec. 234 of the Civil Procedure Code and as such liable to satisfy the decree for costs. In making a decree against a Hindu widow Courts ought to record whether such decree is a personal decree or one against her as representing her husband's estate. *Ram Kishore Chuckerbutty* v. *Kally Kanto Chuckerbutty* 1

Civil Procedure Code, Act X of 1877, section 244 (C). See RES JUDICATA 117

——— sections 244 and 258—*Adjustment of Decree—Execution Proceedings.*] Section 258 of the Civil Procedure Code, Act X of 1877 does not apply to money decrees only,—but deals with the adjustment of any decree. Accordingly, where in execution of a decree by which the decree-holder was declared to be entitled to a specific share, allotted on partition, in certain land, it was objected by the judgment-debtor that the decree-holder had already obtained possession, and had granted him a lease of the land covered by the decree, it was *held* that the objection could not be entertained, in as much as it alleged an adjustment of the decree which had not been certified to the Court under Sec. 258 of the Civil Procedure Code, and therefore could not be recognized. It was further *held* that Sec. 244 of the Code did not apply. *Bala Mahomed* v. *C. R. Webb* .. 36

Civil Procedure Code, Act X of 1877, section 260—*Attachment—Disobedience to order of Court.*] By a decree relating to certain joint property belonging to the plaintiff and defendant, but which had previously been held in the sole name of the defendant, it was directed that the plaintiff and defendant should jointly manage the property, and that the names of both should appear in all papers connected with such property. The plaintiff subsequently applied to have his name registered in the Collectorate, but was opposed by the defendant who, it appeared, also allowed the amlahs of the estate to continue to use his sole name. *Held*, that the Court had under the circumstances jurisdiction under section 260 of the Civil Procedure Code to attach the defendant's property until he had obeyed the decree by having the joint names of himself and the plaintiff inserted in all documents belonging to the estate. *Gouri Prosad Moitra* v. *Bholanath Sanyal* 487

Civil Procedure Code, Act X of 1877, section 265. See PARTITION OF PORTION ONLY OF JOINT PROPERTY, SUIT FOR .. 367

——— sections 272, 277—*Attachment of property—Discretion of Court as to Attachment.*] The Court has no discretion to refuse an application, for attachment of property in Court, made under sec. 272 of the Civil Procedure Code. *Noor Jehan Begum* v. *Mashitty Khanum* 17

Civil Procedure Code, Act X of 1877, sections 274, 287, 295 and 311—*Sale in execution of decree—Satisfaction of decrees rateably—Proclamation to specify amount of incumbrance—Irregularity in execution sale—Execution.*] If when property has been attached in execution of a decree, and prior to sale, an application is made for execution of another decree so that the second decree-holder may participate under section 295 of the Civil Procedure Code in the assets realized, portion of the property attached be sold in the first instance, then, as both decrees are entitled to participate rateably, if the amount realized is not sufficient to satisfy both decrees, although sufficient to pay off the former, a further sale may be held. As to reports of the Nazir and peons of the Court—see *Obhoy Churn Seek* v. *Erskine*, 3 W. R., Misc. 11; *Sreenath Thakoor* v. *Watson*, 4 W. R Misc., 4; *Shib Koondun Lall* v. *Noor Ali*, 10 W. R., 3. Under section 290 it seems intended that the copy of the proclamation should not be "fixed up in the Court House"

Civil Procedure Code,—*continued.*
until the proclamation itself has been made under section 274 of the Civil Procedure Code. When the properties put up for sale in execution of a decree are subject to any incumbrance, the proclamation ought to specify the amount of the debt outstanding. An omission to specify such amount affords strong *primâ facie* ground, where a mortgagee in possession is himself the purchaser, for believing that an indequate price has been obtained. *Megh Lall Pooree Mohunt* v. *Mohammed Dutt Jha* 369

Civil Procedure Code, Act X of 1877, sections 293 and 316—*Default of Auction-purchaser.*] Where portion of the property of a judgment-debtor has been sold in execution for a sum sufficient to satisfy the decree, the Court is not justified, on default being made by the purchaser, in directing the sale of any further portion of the debtor's property, it being open either to the judgment-creditor or the judgment-debtor to apply that the balance due upon the decree, after re-sale of the portion already sold, should be realized from the defaulter. *Joy Chundur Biswas* v. *Kali Kishore Dey Sircar* 41

Civil Procedure Code, Act X of 1877, section 313—*Sale in execution. Application to set aside—Saleable interest—Mortgage.*] In execution of a rent decree, dated 26th May 1879, certain immoveable property was sold in execution and purchased by the appellant on the 21st February 1880, no mention having been made of any incumbrances. On the 9th May 1879, a decree was obtained upon a mortgage executed by the original judgment-debtor and in execution of that decree the property which had already been sold was attached, and, on the 11th March, again sold in execution of the second decree, it being alleged that the property was covered by the mortgage which was prior in date to the former decree. The appellant thereupon applied that the sale of the 21st March should be set aside under section 313 of the Civil Procedure Code and his purchase money directed to be returned to him. *Held*, that if, as a fact, the property sold was covered by the mortgage, there was under the circumstances no such saleable interest in the judgment-debtor at the time of the sale on the 21st as would prevent the operation of section 313 of the Civil Procedure Code, in as much as under that sale the purchaser would be unable to get the particular property purchased by him; and that the sale must be set aside. *Naharmul Marwari* v. *Sadut Ali* 468

Civil Procedure Code, Act X of 1877, sections 394 and 395. See ACCOUNTS .. 321

Civil Procedure Code, Act X of 1877, section 396—*General Clauses Act, I of* 1868, *section* 2—*Partition—Decree, Execution of—"Commissioners."*] *Per* PONTIFEX, *J.*:—Although section 396 of the Civil Procedure Code directs the appointment of *Commissioners* to carry out an order for partition, it is quite competent t Court to appoint one *Commissioner* for that pose. *Quære per* FIELD, *J.*:—Whether the not in the context of section 396 some repugnant to the plural "Commissioners cluding the singular "Commissioner." I dure under section 396 of the Civil Proc Code discussed. *Gyan Chunder Sen* v. . *Churn Sen* .. ..

Civil Procedure Code, *Act X of section* 558—*Appeal, Application for Re-adm of—Reasonable Cause.*] On an application section 558 of the Code of Civil Procedu the re-admission of an appeal which has decided *ex-parte* against the applicant, it app that, he had been misled by reason of the a having been transferred from the file o Court to another, no notice of the transfer h been given to him by the pleaders in the *Held*, that under the circumstances the app was entitled to have the appeal re-adm *Narain Singh* v *Bheurab Churn Panda* .

Civil Procedure Code, Act X of *Section* 560. When an appeal has been *ex-parte* a re-hearing cannot be granted b Court on an application under section 560 Procedure Code, except upon legal evi produced by the respondent, of the facts sary to entitle him to such re-hearing. *M Kalun* v. *Dinomoyee Dashya* .. .

Civil Procedure Code, Act X of section 578. See COURT FEES AC OF 1870, SECTION 12 ..

Civil Procedure Code, Act X of section 578. See SECOND APPE

Civil Procedure Code, Act X of section 584. See SECOND APPE

Civil Procedure Code, Act X of section 647. See ACT VIII (B. 1869, SECTIONS 59 AND 60 ..

Co-contractors, Joinder of, as p tiffs. See PARTIES ..

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——— Heirs, Right of adopte inheriting with. See HINDU LA

Collector, Powers of. See ACT VIII OF 1869, SECS. 38 AND 40 ..

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——— See CODE, ACT XLV OF 1860, SECTION 211

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Complaint, Dismissal of, without examination of witnesses of Complainant. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTIONS 147 AND 470.. 267

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Compensation on partition for expenditure by certain members of Joint family on the joint estate. See PARTITION 259

Compromise, Suit to set aside—*Misrepresentation—Misapprehension or mistake by Court and Parties as to material facts—Sanction of Court to compromise on behalf of infant—Contract Act, IX of 1872, Section 20—Minor, Whether it be for benefit of, to set aside a compromise.*] The plaintiff was entitled on the death of her father, A, to 3-4ths of his estate, brought a suit against M, alleging that he had possessed himself of the whole of A's estate, and in that suit a decree was made directing an account to be taken of the estate of A which had come into his hands. The amount of A's estate depended on whether he had been a partner with M, and whether or not sum of Rs. 30,000 alleged in A's will to have been paid by M to A in full satisfaction of all claims which he might have against the estate his deceased brother, had in fact been paid. Pending the taking of the account M died, leaving a will of which he appointed the defendants executors, and the suit was revived against them. their application for probate of his will, which was afterwards granted, the defendants, stated the value of the property to be Rs. 4,41,124 *so far as they had been able to ascertain and were aware.* Shortly after probate being granted negotiations were entered into for a compromise of plaintiff's claim and ultimately a petition was presented to the Court asking for its approval of certain terms agreed upon, namely, that the plaintiff should accept Rs. 20,000 in full all demands, together with Rs. 5.000 for the costs of her suit. That petition stated the value the estate of M to be Rs. 4,41,124, that the state of A amounted to Rs. 30,000 in case the alleged payment by M to him were proved, but case such payment were not proved, it would amount to a moiety of the estate and effects of that considering the circumstances of the and the difficulties which the plaintiff could have in proving her case, and with a view to put stop to further litigation, trouble and expense, compromise in the above-mentioned terms been agreed upon on her behalf. The compromise having been sanctioned, the executors shortly afterwards discovered the existence property of large value belonging to M, not put in the petition for probate. Thereupon plaintiff brought a suit to set aside the compromise, alleging that it had been brought about through misrepresentations made by the executors in their application for probate, and charging the executors with fraudulent concealment of property. It appeared that the executors might and ought to have known, and had the means of knowing, if they had made reasonable and proper enquiry, that M's estate was of much larger value than they had represented it to be. *Held*, that the compromise had been entered into by the parties and sanctioned by the Court on a serious misapprehension of material facts—which misapprehension was caused either by the actual fraud of, or at any rate by a culpable neglect of duty on the part of the executors, sufficient to amount to fraud in the view of a Court of Equity, and that the case must be remanded to the Lower Court to try all the issues raised in the suit. *Quære* per PONTIFEX, *J.*:—Whether it may not be necessary in this suit for the Court to consider whether it will be for the benefit of the infant to set aside the compromise, if the question should arise. Per PONTIFEX, *J.*:—When the sanction to a compromise on behalf of an infant of the Court is required, it is the duty of each party to see that the materials before the Court are unimpeachable. Per GARTH, *C. J.*:—Section 20 of the Contract Act seems to be intended to meet a case of this kind, and therefore if the case rested on nothing more than the mistake of both sides and of the Judge who gave the sanction, the compromise should be set aside. Per GARTH, *C. J.*:—In a substantive suit brought by a minor to set aside a compromise obtained by fraud or mistake, it is not the province of the Court to enquire whether it would or would not be beneficial for the minor that the compromise should be set aside, though it might be otherwise on an application for review made in the former suit, to the Judge who gave the sanction. *Bibee Solomon* v. *Abdool Azeez* .. 169

Conduct of parties, Estoppel by. See EVIDENCE 346

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——————— **section 56.** See SPECIFIC ACT I, OF 1877, SECTION 40 501

Contract Act, IX of 1872, section 68.
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——— section 265 *—Partnership business, Winding up of—District Court—Subordinate Judge, Court of—Bengal Civil Courts Act, VI of* 1871*—Inferior Court—Jurisdiction in suits for dissolution of partnership.*] It was the intention of the Legislature in enacting section 265 of the Contract Act to create, as to the matters dealt with by the section, a new jurisdiction to be exercised exclusively by the Court of the District Judge. Accordingly in the absence of any contract to the contrary the members of a partnership or their representatives, must apply to that Court, if they desire to have the business of the partnership wound up under the provisions of the section. [See *Lachmun Lall* v. *Ram Lall*, 8 C. L. R., 115 and *Javali Ramasami* v. *Sathambakam*, I. L. R.; 1 Mad., 340 where a different construction has been put upon section 265 of the Contract Act. Ed.] Having regard to the provisions of the Bengal Civil Courts Act, VI of 1871, the Court of a Subordinate Judge is a Court inferior to the Court of the District Judge. *Per Curiam* :—The presumption that the existing jurisdiction of a Court is not intended to be taken away by an enactment unless express words have been used for that purpose usually applies only to the jurisdiction of the Superior Courts. *Prosad Dass Mullick* v. *Kedar Nath Mullick* 329

Contract, Cancellation of. See SPECIFIC RELIEF ACT I, OF 1877, SECTION 40 .. 501

Contract, Construction of— *"Delivery to be taken and given in the whole of November on 7 days' notice from buyer."*] In a contract for the purchase or sale of certain goods, it was stipulated that "delivery should be taken and given in the whole of November on 7 days' notice from the buyer." *Held*, that the words "on 7 days' notice from the buyer" gave the right to the buyer of fixing the particular time in November at which the delivery was to take place, and that the seller was bound to commence delivery on the expiration of 7 days from notice being given. *Juggernath Khan* v. *J. E. MacLachlan* .. 225

Contract in part impossible of performance, Recission of. See SPECIFIC RELIEF ACT, I OF 1877 501

———, Non-joinder of plaintiffs in actions on. See PARTIES.. .. 457

——— Partial Cancellation of. See SPECIFIC RELIEF ACT, I OF 1877, SECTION 40 501

Contract Suit for Breach of— *Performance, Time for.*] A contract dated 8th June 1880, for the sale of seed by the plaintiff to the defendant, at so much per maund provided as follows:—"Refraction guaranteed at 4 per cent. with usual allowance up to 6 per cent. exceeding which, the seller is to re-clean the seed at his expense within a week; failing which, buyers to have the option of cancelling that portion of the contract, tendered, or of buying against the seller, or of taking the parcel as it stands with usual allowance for excess refraction. Delivery from seller's godown in pile, up to the 15th July next." Notice having been given that the seed was ready for delivery, on the 10th July on delivery having been applied for, it was found on examination that the refraction was above the contract rate. It was then agreed that the vendor should re-clean the seed, and on the 13th July, when delivery was again applied for, it was found, on the re-cleaned seed being examined that the refraction was still in excess of the contract rate. On the 15th July the vendor asked for a week's time again to re-clean the seed. The purchasers, however, cancelled the contract. In a suit by the vendors for damages for breach of the contract *Held*, (1) that the breach of the contract was with the plaintiffs, and (2) that the week allowed by the contract for re-cleaning the seed commenced from the 10th July when the refraction was found to be in excess of the contract rate; and that as the plaintiffs had not succeeded in reducing the refraction to that rate within a week from that date, the defendant had a right to reject the seed. *Buddree Doss* v. *Ralli* .. 294

Continuance of possession. See DIVISION 90

Contribution, Suit for— *Act XI of* 1857 *Sec.* 9*—Tenant, Payment of revenue by—Limitation Act, XV of* 1877*, Schedule II, Arts.* 99 *and* 132*—Practice—Contract Act, IX of* 1872*, Sec.* 69.] Where the Government Revenue of portion of a taluq has, on default by the landlord, been paid by the tenant holding the remaining portion of the taluq under a baibilwufa and zurpeshgi the tenant is entitled, not only under section 9 of Act XI of 1859, but also under section 69 of Act IX of 1872 to recover the amount so paid by him, the landlord's liability in such a case being not merely personal, but a liability imposed upon his estate, *Mothoora Nath Chattopadhya* v. *Kris Kumar Ghose*, I. L. R., 4 Cal., 369. The period of limitation applicable to such a suit is that provided by Art. 32 of Schedule II of Act XV of 1877 and not by Art. 99 of that Schedule. *Chowdhry Ram Dut Singh* v. *Hurak Narain Singh* 209

Control of Execution proceedings. See EXECUTION 41

Co-Sharers, Agreement by one of several, to pay enhanced rent in respect of whole tenure. See ENHANCEMENT 511

Construction of Document. See HINDU LAW 57

—— —— **of Will.** See HINDU LAW 473

Constructive possession. See DILUVION 90

Corpus, Gift of. See HINDU LAW .. 473

Costs as between party and party. See MORTGAGE, REDEMPTION OF .. 437

Costs of legal proceedings on behalf of infant, whether necessaries. See INFANT 433

Co-sharers, Suit for rent by one of several. See RENT, SUIT FOR SHARE OF 44

Court, Disodience to order of Court. See CIVIL PROCEDURE CODE ACT, X OF 1877, SECTION 260 487

Court Fees Act, VII of 1870, Section 2—*Insufficient Stamp—Valuation of suit—Civil Procedure Code, Act X of* 1877 *section* 578.] Notwithstanding the provisions of section 578 of the Code of Civil Procedure, an Appellate Court is competent under section 12 of the Court Fees Act, VII of 1870 to dismiss the plaintiff's suit when it has been brought upon an insufficient stamp, and the plaintiff does not, when so directed, pay the amount of the deficiency, although no objection as to the amount of the Stamp shall have been taken in the Court below. *Shyami Sunduri* v. *Huro Sunduri* 528

Court, Power of. See EXECUTION OF JOINT DECREE 34

Covenant against alienation. See BOND 454

Criminal Proceedings, Institution of. See PENAL CODE, ACT XLV OF 1860, SECTION 211 235

Criminal Procedure Code, Act X of 1872, sections 113 and 119. See PENAL CODE, ACT XLV OF 1860, SECTIONS 191 AND 193 300

—— —— —— **Act X of 1872, section 119.** See PENAL CODE, ACT XLV OF 1860, SECTIONS 191 AND 193 236

—— —— —— **Act X of 1872, sections 147 and 470**—*Penal Code, Act XLV of* 1860, *section* 211—*Dismissal of Complaint without examination of witnesses of Complainant—sanction to prosecute under Section* 470 *of the Criminal Procedure Code.*] A Magistrate before whom a complaint has been made, after examining the complainant, but without examining his witnesses, dismissed the complaint under section 203 of the Civil Procedure Code. Shortly afterwards the person accused applied to the Magistrate and obtained sanction under section 470 of the Criminal Procedure Code to prosecute the complainant under section 211 of the Penal Code, and proceedings were thereupon commenced before another Magistrate who subsequently committed the original complainment to the Court of Session. No application was made that a further enquiry might be made notwithstanding the order of dismissal. *Held*, that the proceedings in the original complaint had been terminated in a regular manner, and therefore the order sanctioning the prosecution was not illegal by reason of the Magistrate not having examined the witnesses of the complainant. *Syed Nissar Hossein* v. *Ramgolam Singh*, 25 W. R. Cr., 10 dissented from. *Gyan Chunder Roy, in the matter of* 267

—— —— —— **Act X of 1872, section 218**—*Witnesses of Prosecution, Recall and cross-examination of—Procedure where accused desires to recall and cross-examine witnesses of prosecution.*] The right of an accused person to recall and cross-examine the witnesses of the prosecution under section 218 of the Code of Criminal Procedure, must be exercised at the time when the charge is read and explained to him under the preceding section, and if not exercised at the time, it cannot afterwards be insisted on—although it is in the discretion of the Magistrate to recall the witnesses if he think fit. *Sheikh Faiz Ali, in the matter of* .. 325

—— —— —— **Act X of 1877, section 237**—*Guilty, Plea of—Plea of guilty to be recorded.*] Where a prisoner on the charge being read and explained to him pleads guilty, the Judge must record the plea under section 237 of the Criminal Procedure Code, and not merely record a narrative of what occurred and of the statements made by the prisoner. An admission which does not admit all the elements of the charge is not a plea of guilty to the charge. *Golap Dhanook* v. *The Empress.* .. 471

—— —— —— **Act X of 1872, section 454**—*Cumulative Sentence—Penal Code, Act XLV of* 1860, *sections* 147 *and* 324—*Separate charges.*] Under section 454 of the Code of Criminal Procedure the collective punishment which may be awarded for offences under sections 147 and 324 of the Indian Penal Code must not exceed that which may be given for the graver offence. *Quære:* Whether separate convictions under sections 147 and 324 of the Indian Penal Code are legal. *Jabdar Kazi* and *Golap Khan, In the matter of* 390

—— —— —— **Act X of 1872, section 471.** See CIVIL COURT, ORDER BY, UNDER SECTION 471 OF CRIMINAL PROCEDURE CODE 148

—— —— —— **Act X of 1872, section 518.** See PENAL CODE, ACT XLV OF 1860, SECTION 188 ... 231

—— —— —— **Act X of 1872, section 521**—*Procedure—Obstruction—Thoroughfare.*] The fact of a Magistrate taking

Criminal Procedure Code—*continued.*
action under section 521 of the Code of Criminal Procedure is *primâ facie* sufficient to show that he considers the *locus in quo* to be a thoroughfare or public place; and if no objection is taken that it is not such, and the jury find that the order made under that section is reasonable and proper, the High Court will not interfere. *Imandi Khan, In the matter of* 399

——— **Act X of 1872, sections 521 and 525**—*Evidence—Procedure.*] Where a person to whom an order has been issued under section 521 of the Code of Criminal Procedure, appears to show cause against such order, the Magistrate is bound to take evidence under section 525 of the Code. *Mohur Mandar, In the matter of* ... 431

——— **Act X of of 1872, section 530**—*Jurisdiction of Magistrate's duty to maintain decree or order of competent Court—Land Registration Act, order under, as to possession—"Dispute,"—Breach of Peace—Act X of 1872, Section 491.*] The principle that where there has been a decree passed between rival claimants to immovable property, it is the duty of the Magistrate to maintain such decree, is applicable to orders in proceedings under the Land Registration Act declaring a particular person in possession. Accordingly where an order had been made under that Act, in the presence of both parties, and after evidence taken on both sides, declaring one of the parties to have proved possession, and entitled to have his name registered, and pending the confirmation of that order, disputes arose as to the land in question it was *held*, on the ground that when the rights of the parties had been determined by a competent Court, there was no longer a "dispute" within the meaning of that section 530 of the Code of Criminal Procedure, that it was not competent to the Magistrate to take proceedings under that Section. The proper course for a Magistrate to pursue, if the unsuccessful party does any act that may probably occasion a breach of the peace, is to take action under section 491 of the Code of Criminal Procedure. *Gobind Chundur Moitra* v. *Abdul Syad* 217

——— **Act X of 1872, section 530**—*Preliminary proceeding before Magistrate—Dispute likely to give rise to breach of peace—Jurisdiction*] It is not sufficient to give a Magistrate Jurisdiction under section 530 of the Code of Criminal Procedure for him to record in his final judgment an opinion or proceeding, that it is probable that a breach of the peace will occur if proceedings under that section be not taken. *Damodur Bedyadar* v. *Shyamanund Dey* 514

——— **Act X of 1872, Section 530**—*Proceeding to be recorded under section 530 of Act X of 1872—Police Report, Incorporation of, in proceeding recorded by Magistrate—Possession—Title, how far evidence of Possession.*] Where action was taken under section 530 of the Criminal Procedure Code, the Magistrate recorded the following statement "whereas from the police report a breach of the peace is probable," as the ground of his proceeding under that section. *Held*, that the proceeding thus recorded by the Magistrate was not in itself a sufficient compliance with the requirements of the section which requires that the proceeding shall state that the Magistrate is satisfied that a dispute likely to induce a breach of the peace existed and the ground upon which he is so satisfied, but that the police report referred to might be incorporated to show that a dispute likely to induce a breach of the peace existed, and that there were grounds upon which the Magistrate might reasonably be satisfied. Where there has been substantial evidence of possession or a conflict of evidence on that question the Magistrate is justified in looking to the evidence of title in corroboration of the evidence of title. *Kali Kristo Thakur* and *Golam Ali Chowdhry* 245

——— **Act X of 1872, section 489.** See RECOGNIZANCE 73

——— **Act X of 1872, Section 359**—*Refusal to summon witnesses—Evidence.*] In a prosecution the case on both sides having been closed, the Magistrate issued a summons to a witness to give evidence, whereupon the accused filed a petition praying to have certain witnesses summoned to give evidence to rebut that of the witness called by the Magistrate. The petition was refused. *Held*, that the Magistrate was not at liberty to refuse to summon the witness tendered by the accused, except on the grounds specified in section 359 of the Code of Criminal Procedure—and that the fact that the accused had, at the close of his case stated that he did not wish to call the witnesses whom he now tendered, was no reason for refusing to summon them to meet fresh evidence taken by the Magistrate. *Deela Mahton, in the matter of* 70

Cumulative Sentence. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 454 359

Custody of Lunatic. See ACT XXXV OF 1858 89

Damages. See CONTRACT, SUIT FOR BREACH OF 294

Darputni, Decree for compensation for loss of by sale of putni. See REG. VIII OF 1819, SECTION 17, CL. 5 ... 141

Debts, Liability for. See MITAKSHARA JOINT FAMILY 227

Deceased witness, Deposition of. See EVIDENCE ACT, I OF 1872, SECTIONS 32 AND 33 273

Decree, Adjustment of. See CIVIL PROCEDURE CODE, ACT X OF 1877 SECS. 244 AND 258 36

Decree against Mitakshara father in Representative capacity ... 428

——— **directing names of parties to be used jointly, Execution of.** See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 260 487

——— **Execution of.** See EXECUTION OF DECREE 261

——— **for arrears of rent at particular rate, whether a bar to suit for abatement** See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 13, EXPL. II 393

——— **for Maintenance of Wife.** See MAHOMEDAN LAW 242

Deed of Gift. See GIFT 441

Default by Auction-purchaser. See CIVIL PROCEDURE CODE, ACT X OF 1877, SECS. 293 AND 316 41

"Delivery to be taken and given in the whole of November on 7 days' notice from buyer." See CONSTRUCTION OF CONTRACT 225

Deposition of deceased witness. See EVIDENCE ACT, I OF 1872, SECTIONS 32 AND 33 273

——— **of witnesses.** See PERJURY IN RESPECT OF EVIDENCE IN A CIVIL COURT 292

Diluvion—*Constructive possession—Adverse possession—Onus of proof—Limitation Act IX of 1871, Schedule II, Articles* 141-2-3-5—*Continuity of possession.*] Where in a suit for possession of a jungle land or of land which has been diluviated and which is alleged to have been wrongfully taken possession of by the defendant, the plaintiff gives *primâ facie* proof of his title, the onus is upon the defendant to show that he (the defendant) has acquired a Statutory title by a 12 years' adverse possession which has put an end to the plaintiff's right. *Radha Gobind Roy Saheb v. Gopilia*, 7 C. L. R., 364 followed. *Maharajah Luchmeswar Singh* v. *Nundo Lall Singh*, 8 Mooro's I. A., 199 distinguished. Possession under a *bonâ fide* claim of right existing at the time of the land being diluviated will be presumed to continue during the period of submersion. WHITE, *J.* :—"Dispossession, or discontinuance of possession, mentioned in art. 143 of the Limitation Act IX of 1871 is that which occurs where the property is in the actual possession of, or is capable of being taken possession of, by another, and does not include the case where the property is submerged by act of God, and so made impossible of occupation or actual possession. * * * * Owners of land, which has suffered from successive diluvions and re-formations, must, if they wish to preserve their rights, bring their suit within twelve years of the time when adverse possession is first taken of land re-forming on the original site, whether at the time of suit the land is capable of occupation or lying under water in consequence of a second diluviation. *Kali Churn Sahu* v. *Secretary of State* 90

Discretion of Court as to applications for attachment. See CIVIL PROCEDURE CODE, ACT X OF 1877, SECS. 272 AND 277 17

Dismissal of Complaint—Presidency Magistrates Act, IV of 1877, *sections* 32 *and* 124.] An order of dismissal, passed by a Presidency Magistrate under section 124 of the Presidency Magistrates Act does not operate as an acquittal of the accused, and is no legal impediment to the institution of fresh proceedings by the presentation of a fresh complaint. *Thomson, J. A, in the matter of* 106

Dismissal of Complaint, without examination of witnesses of Complainant. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTIONS 147 AND 470... 267

Dispute likely to give rise to breach of the Peace. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 530 ... 514

"Dispute." See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 530 217

Disobedience to order of Court. See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 260 487

Dissolution of Partnership, Suit for. See Partnership 115

District Court, Jurisdiction of in Partnership matters. See PARTNERSHIP, SUIT FOR DISSOLUTION OF 115

District Court, Jurisdiction of in Partnership suit. See CONTRACT ACT, IX OF 1872, SECTION 265 329

Distraint. See PENAL CODE ACT, XLV OF 1860, SECTION 379 204

Document, Construction of the Hindu Law 57

Document, Forgery of. See FORGED DOCUMENT 542

Document, Secondary Evidence of. See EVIDENCE 337

Dower, Act XXIX of 1839. See DOWER 78

Dower—Introduction of English Law *Freehold Estate of Inheritance—Armenian Widow—English Law, how far applicable in Calcutta—Succession Act (X of* 1865,) *Section* 4—*Estoppel—Admissions by Conduct*—21 *Geo. III, C.* 70, *Section* 17—*Dower Act (XXIX of* 1839).] The widow of an Armenian, married before the Dower Act (XXIX of 1839), is entitled to dower out of lands which her husband held during the marriage for

Dower—*continued.*
an estate of inheritance, as against a Hindu purchaser for value from the husband during his life, the English law of dower having been recognized in this country amongst Europeans and Armenians as a branch of the law of inheritance. *Per* GARTH, *C. J.* :—The law of dower has been recognised in this country amongst Europeans and Armenians as a branch of the law of inheritance, and estates which have been held by British subjects under the name of freehold estates of inheritance, are in all essential respects, the same estates which have been held in England under the same name. The case of *The Mayor of Lyons* v. *The East India Co.*, 1 Moore's I. A., 175, does not decide that the Courts of this country are justified in adopting just so much of the law of inheritance, or of dower, or of any other law, as they consider equitable, and rejecting the rest. It only points out that there are certain portions of the English Statute law which from their very nature were only passed for reasons connected with England, and which would not be applicable in India or any colony of the British Crown,—*e. g.*, the Mortmain Acts, the law of aliens and the like. The provisions of Section 4 of the Succession Act are prospective, and leave rights unaffected which had already been acquired before the Act passed. *Per* PONTIFEX, *J.* :—The true construction of Section 17 of 21 Geo. III, C. 70, must confine the words "their inheritance and succession" to questions relating to inheritance and succession by the defendants. The deed of conveyance of land in Calcutta recited that the vendor was "seised of, or otherwise well entitled" to, the property intended to be sold "for an estate of inheritance in fee-simple," and it purported to convey such an estate. *Held*, that although, as between the plaintiff and the defendants, there was no estoppel which could prevent the defendants from proving that the estate sold was other than an estate in fee-simple, yet, as the purchaser bought the property as and for an estate of inheritance and paid for it as such, the recital was *primâ facie* evidence against the purchaser and persons claiming through him; that the estate conveyed was what it purported to be, it being an admission by conduct of parties which amounted to evidence against them. *Sarkies* v. *Prosonomoyee Dassee* 76

Easement—*Passage for boats—Channel, Right of Passage over—Obstruction—Right of way—Cause of action.*] A suit to have a certain channel over which the plaintiff had a right of passage for boats, and which had been slightly narrowed by the defendant (on whose land it was,) restored to its original condition, it appeared that the narrowing had in no way interfered with the passage of even the largest boats. The suit was dismissed on the ground that the plaintiff had suffered no injury. *Held*, that the suit was rightly dismissed. *Per* GARTH, *C. J.* :—

Easement—*continued.*
A right of passage for boats over another man's channel is analagous to a right of way claimed over another man's road. The only obligation on the servient owner is, that he shall not unreasonably contract the width of the road or render the exercise of the right of passage less easy than it was at the time of the grant. A right of way or right of passage for boats cannot be claimed in every direction over another's land. *Durga Churn Dhur* v. *Kali Kumar Sen* 375

Easement. See LIMITATION ACT, XV OF 1877, SECTION 26 ILLUSTRATION (b) ... 281

Elder son of Junior wife. See HINDU LAW 315

Embankment, Nature of obligation of Zemindar to repair. See REPARIAN EMBANKMENT 553

Endowment. See MAHOMEDAN LAW ... 164

English Law, how far applicable to Calcutta. See DOWER 78

——— Introduction of. See DOWER 78

Enhanced Rent Agreement by one of several co-sharers to pay in respect of whole tenure. See ENHANCEMENT 511

Enhancement—*Enhanced rent, Agreement by one of several co-sharers to pay in respect of whole tenure—Acquiescence.*] One of the holders of an under-tenure having agreed with his immediate landlord that an enhanced rent should be paid in respect of the tenure, the enhanced rent fixed was paid for some years, when, default being made, the landlord brought a suit against all the joint-holders for arrears of rent at the enhanced rate. *Held*, that the landlord was entitled to rent at the rate claimed until circumstances were shown from which it would follow that the rate claimed was not the fair and equitable rate payable. *Held*, further, that the holder by whom the agreement to pay the enhanced rent was made, was not solely liable to pay that rent, but that the tenure was also liable, and that if it could be shown that the other holders had acquiesced in the agreement they were likewise responsible. *Burhunuddi Howladar* v. *Mohun Chunder Guha* (1) *ante*, p. 508 distinguished. *Burhunuddi Howladar* v. *Mohun Chunder Guha* 511

2 ——— *Enhanced rent, Special agreement to pay for specified period—Tenant holding over—Landlord and tenant.*] The defendant being, under a settlement originally obtained from the Government, bound to pay a particular rent to the plaintiff who had subsequently to that settlement obtained an ijarah from the Government, the plaintiff in 1879, sued to enhance that rent and obtained a decree upon which a compromise was made, the defendant agreeing to pay a higher rent for the years 1281 and 1282. The de-

hancement—*continued.*
lant having paid no rent for 1283 and 1284, plaintiff sued for the arrears at the higher . *Held*, that no proper proceedings for en- ɔement having been taken or fresh contract ı the defendant entered into, the special ar- ɔement came to an end at the expiration of ɜ and the originul arrangement revived, and efore the plaintiff was not entitled to demand e than the original rent payable. *Burhun- i Howladar* v. *Mohun Chunder Guha* .. 508

——— **Notice of Enhance-nt**—*Onus where, in Enhancement Suit, defen- t alleges portion of the lands to be rent-free.* In uit by a zemindar for enhancement of the t if the tenant alleges that portion of the ds held by him is rent-free, the burden of ving a *primâ facie* case as to this is on the ant. *Huryhur Mookerjee* v. *Goomanee Kazee*, rshall's Report, 523, considered. *Gooroo Per- l Roy* v. *Juggobundoo Mozoomdar*, W. R. Spec. ., p. 15, *Nehal Chunder Mistree* v. *Huree Per- ıl Mundal*, 8 W. R., 183, *Beebee Ashrufoonissa Umung Mohun Deb Roy*, 5 W. R. Act X Ruling followed. A notice of enhancement is not d by reason of its being shewn that portion the lands the rents of which are sought to be hanced are rent-free, but is good as applicable the remainder. *Newaj Bandopadhya* v. *Kali ɔmmo Ghose* 6

——— **of Rent**—*Act VIII (B. C.) 1869—Enhanced Rent, Suspension of decree for, ubsequent agreement—Procedure to enhance rent r Suspension by agreement of decree for enhanced in former Suit.*] A decree for enhanced rent ing been obtained, the zemindar agreed that tenant should be allowed to hold a lease at rent for a certain number of years on cer- conditions. After the expiration of the d fixed by the lease, he sued to recover at the rate declared payable by the en- ment decree. *Held*, that the effect of the ment was to suspend the decree in the ab- of a provision in the lease for the revival decree on the expiration of the term limit- he plaintiff must have recourse to the pro- laid down by the enhancement provisions VIII (B. C.) of 1869, if he seeks to recov- igher rent than that paid under the lease. *Chunder Sircar* v. *Gour Chunder Shaha* 161

ncement of Rent on ground of ncreased value of produce. See COND APPEAL 449

nced rent, Special Agreement to y for specified period. See EN- CEMENT 508

——— **Suspension of Decree by subsequent agreement.** See ANCEMENT OF RENT 161

yment of Right." See LIMITATION XV OF 1877, SECTION 26, ILLUSTRATION 281

Enquiry as to necessities for alienation by Hindu Widow. See HINDU LAW 361

Enquiry of Police See PENAL CODE, ACT XLV OF 1860, SECTION 211 387

———, **Preliminary.** See PENAL CODE, ACT XLV OF 1860, SECTIONS 191 AND 193 236

Equity to restrain Execution proceedings. See EXECUTION 43

Error of law. See SECOND APPEAL ... 597

Estoppel by conduct. See EVIDENCE 364

Estoppel. See DOWER 78

——— See EXECUTION OF DECREE ... 261

Evidence Act, I of 1872, sections 5, 6, 8, 11, 14—*Evidence on Criminal trial, of unconnected acts of same nature as those charged.*] In a trial upon three specific charges of receiving illegal gratification from the firm of C. and Co., at T. in 1876, evidence of similar but unconnected instances of receiving illegal gratifications from the same firm at Thayetmo in the years 1877 and 1878 was offered. *Held*, that such evidence was inadmissible. *Per* MITTER, *J.*:—If the receipt of the several sums mentioned in the charges be considered to have been proved by *other* evidence, and if it were necessary to ascertain whether the accused received them as a *motive* for showing favour in the exercise of his official functions, the alleged transaction of 1877 and 1878 might be relevant under section 14 of the Evidence Act; but they are not relevant for the purpose of establishing the fact of payment in 1876. *Empress* v. *M. J. Vyapoory Moodiliar* ... 197

———, **Sections 32 and 33**—*Deposition of deceased witnesses—"Issue substantially the same."*] The deposition of the complainant upon a charge of grievous hurt having been taken before the Magistrate, the complainant died. In consequence of his death, charges of murder and culpable homicide not amounting to murder were added before the Sessions Judge. *Held*, that the deposition of the complainant before the Magistrate was admissible in evidence before the Sessions Court under section 33 of the Evidence Act. *Per Curiam*:—By "the questions in issue" referred to in section 33 of the Evidence Act being required to be "substantially the same," it is not intended that, in a case where the person injured dies subsequently to the enquiry before the Magistrate, his evidence is not to be used before the Sessions Court because in consequence of his death other charges are framed against the accused. * * * The matter depends upon whether the same evidence is applicable, although different consequences may follow from the same act. *Rohlia Mahto* v. *The Empress* 273

——— **Section 33.**—*Witness "incapable of giving evidence," Deposition of.*] To bring a case within section 33 of the Evidence Act, in order to admit a deposition of a

Evidence—*continued.*
witness alleged to be unable to attend by reason of illness, it is not sufficient that such witness should be stated to be ill and confined to the house, but precise evidence should be required by the Court as to the nature of the illness and the incapacity to attend. Per *Pontifex* and *Field, JJ.*—The incapacity to give evidence contemplated by section 33 of the Evidence Act in our opinion is not necessarily a permanent incapacity. *In the matter of Pyari Lall*, 4 C. L. R., 504 doubted. *Asgur Hossein, In the matter of* ... 124

Evidence Act, I of 1872, section 50—*Statement made in absence of accused—Confession.*] In a case of riot which resulted in the death of one person and serious injury to others from gunshot wounds, the persons implicated were tried together before the Sessions Judge who adopted the following procedure. He examined the prisoners one by one, requiring the others to withdraw from the Court until their respective turn for examination came round, and, principally upon statements thus obtained in their absence, he convicted all the prisoners. *Held*, that the Sessions Judge had, in adopting such procedure, acted in a manner directly opposed to the rule that no one should be condemned upon statements made in his absence, and therefore that all statements thus made by any of the prisoners in the absence of another, must be put out of consideration so far as they affect the latter. *Chundur Sircar* v. *Empress* 352

——— **section 65**—*Secondary Evidence—Assignee of bond in possession of one who does not produce it—Loss or Non-production by obligee of Bond assigned to third person.*] The plaintiff having on the 28th December 1877 in execution, under Act VIII of 1859, of a decree against R purchased a debt due to R upon a registered bond, dated the 28th March 1873, filed a suit against the obligor, on the 12th March 1878 to recover the amount of principal and interest secured by the bond and made R a defendant and served him with a summons to produce the bond. No appearance in the suit was entered by R and on his not producing the bond criminal proceedings were instituted against him. The other defendant denied having executed the bond or having borrowed the money alleged to have been secured by it. A copy of the bond from the Registrar's office was tendered and received as secondary evidence, as well as the Mookhtarnamah under the authority of which it was registered, but no evidence of the loss or destruction of the original bond was given. The lower Courts found that the bond had been executed by the defendant and registered under a power executed by her and that the money was paid to her father and applied to the payment of Government Revenue due in respect of her estates. On appeal it was objected that a sufficient foundation had not been made for the admission of secondary evidence. *Held* (by PONTIFEX and MORRIS, *JJ.*,

Evidence—*continued.*
PRINSEP, *J. dissentiente*) that the plaintiff not stand in a higher position than the of the bond, and that as before R co given secondary evidence of the land have been necessary for him to prove its tion or loss, the copy from the Registrar had been improperly admitted. *Per* P *J.*:—Making R a defendant and givi notice to produce would not entitle the to use the copy from the Registrar's secondary evidence of the bond. *Per* *J.*:—That with the findings of fact by th Courts, and payment not pleaded by the the plaintiff was entitled to a decree. *Chunder Ghose* v. *Shama Sundari Bye*

Evidence Act, I of 1872, secti
See PERJURY IN RESPECT OF EVIDE
CIVIL COURT ... ...

——— ——— *Burden of Proof—Estoppel—of parties—Registration in Collectorate.*] to recover possession of certain land and in which the plaintiffs rested their claims allegation that when the succession ope they were seventh in degree, whereas the dants were eighth in degree from a ancestor and were entitled to no part of perty, it appeared that immediately opening out of the succession, the plain treated the defendants as having equa with themselves and as being in an eq tionship to the common ancestor and mitted their names to be registered as the collectorate books. *Held*, (affirming cree of the High Court at Allahabad) course of conduct of the plaintiffs altho amounting to an estoppel in point of l the burden upon them of proving the a on which they rested their claim. *Singh* v. *Fowjdar Singh* ... (P.

———, **Improper reasons for lieving.** See SECOND APPEAL ...

——— ——— **of consideration for missory note Annulled,**—*Lost p note—Account stated verbally, Suit upon tion Act, XV of* 1877, *Schedule II, Art.* 6 plaintiffs having a claim against the de for the value of a share in a partnership it was verbally agreed that Rs. 250 sh taken as the value of the share and th Rs. 25 was given to the plaintiff as part and in return for a promissory note for lance payable two months from the plaintiff made over to the defendant a re the same amount. In a suit institute than three years after the date of the n plaintiff sought to give secondary evi the note which had in the meantime b The original note was insufficiently *Held*, that the note having been insu stamped, secondary evidence of its conte inadmissible. *Held*, further, that the

Easement—*continued.*
ould not recover the money due thereunder as pon an account stated in as much as (1) the riginal claim upon such an account had been onverted into a claim upon the note, and (2) the laim, if any, upon such an account as stated was arred by limitation. *Per* GARTH, *C. J.*:—When cause of action for money is once complete in elf, whether for goods sold or for money lent, r for any other claim, and the debtor then ives a bill or note to the creditor for the pay-ent of the money, the creditor, if the bill or ote is not paid at maturity, may always as a ule sue for the consideration, provided that he as not endorsed or lost or parted with the bill r note under such circumstances as to make the debtor liable upon it to some third person. But when the original cause of action in the bill or ote itself does not exist independently of it, in uch a case the bill or note is the only contract etween the parties, and if for want of a proper tamp or other reason the note is not admissible, he creditor must lose his money. *Golap Chand Marwaree* v. *Thakooranee Mohakoom Kooaree*, I. L. R., 3 Cal., 314 explained. *Quære*:—As to the period of limitation in the cause of an account stated verbally. *Shekh Aubar* v. *Shekh Khan* 533

——— **of landholders as to increased value of produce in suits for enhancement.** See SECOND APPEAL 449

———, **on Criminal Trial, of unconnected acts of same nature as those charged.** See EVIDENCE ACT, I OF 1872, SECTIONS 5, 6, 7, 8, 11 and 14 197

——— *Secondary Evidence of Deed—Original Deed, Search for.*] In a suit to recover a hare of joint family property, the defendants elied upon a deed of *Anumati patro*, alleged to ave been executed in 1826 by the ancestor of he joint family, distributing the property in a anner different from that in which it would ave been distributed by law. This deed ad been filed in proceedings in 1832, 1837 on ehalf of a member of the family, and again n 1857 on behalf of A, one of the defendants in he suit. It appeared that the original deed as, in 1857, given back to A's mukhtear on is receipt. Secondary evidence was given of he deed, but there was nothing to show that ny endeavour had been made to obtain the riginal from the custody of A's mukhtear. *eld*, (affirming the decision of the High Court) at the original deed had not been sufficiently ccounted for, and that therefore secondary idence of its contents was inadmissible. *hoobuneswari Debi* v. *Hurri Sarun Sarma Matro* (P. C.) 337

vidence, Secretary, of bond in possession of Assignee who does not produce it. See EVIDENCE ACT I OF 1872, SECTION 65 489

Evidence,—*continued.*
——— See CRIMINAL PROCEDURE CODE ACT X OF 1872 SECTION 359 70

——— See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTIONS 521 AND 525.. 431

Exciseable liquors, Sale of. See ACT VII (B. C.) OF 1878, SECTION 60 152

Excise Act, VII (B. C.) of 1878, section 60. See ACT VII (B. C.) OF 1878 ... 152

Excise Act, Previous Conviction under. See ACT VII (B. C.) OF 1878, SECTIONS 9, 58 AND 74 250

Execution, Application to set aside sale in. See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 313 465

——— **of decree for rent by sale of under tenure.** See ACT VIII (B. C.) OF 1869, SECTIONS 61 AND 64 407

Execution of Decrees in Rent Suits. See ACT VIII (B. C.) OF 1869, SECS. 5, 27, 28, 29, 30 AND 50 19

——— *of joint decree. Court, Power of.*] In executing a joint decree against several debtors, it is not open to a Court to stay the sale of the property of certain of the debtors, upon their offering to pay what they consider their share of the amount due under the decree; nor can a Court, in such a case, upon proper action taken by the judgment-creditor refuse to attach and sell the property of any one of the judgment-debtors in satisfaction of the entire judgment debt. The liabilities of joint debtors as amongst themselves if not settled privately can be determined only in another suit. *Kally Mohun Bal* v. *Dinonath Chuckerbutty Chowdhry* 34

———.**of Mortgage Decree**—*Act VII (B. C.) of 1868, Sale under—Mortgage decree, Execution of.*] The purchaser at an auction sale for arrears of Government Revenue of certain land sold subject to all encumbrances having subsequently purchased a decree passed prior to such sale upon a mortgage of the same land, the decree being not only personal against the judgment-debtor but also declared to be a charge upon the mortgaged property, sought to execute this decree against the surplus proceeds of the auction sale lying in the Collectorate to the credit of the judgment-debtors. *Held*, that decree-holder was bound in the first instance to proceed against the mortgaged property. See *Solano* v. *Moran*, 4 C. L. R., 11. *Goloke Chundur Mahinta* v. *Sarbomongala Debi* 189

——— **Proceedings.** See CIVIL PROCEDURE CODE, ACT X OF 1877, SECS. 244 AND 258 36

——— **Proceeding "struck off."** See ATTACHMENT, WHETHER SUBSISTING 157

——— See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTIONS 274, 287, 298, 295 AND 311 369

Executions, Bond by. See SUCCESSION ACT, X OF 1865, SECTIONS 3 AND 256 ... 397

Ex-parte Decree, whether final. See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 13 257

Execution of Decree—*Jurisdiction—Certificate of non-satisfaction of decree, Objection to jurisdiction of Court to grant—Estoppel.*] Certain property having been sold in execution of a decree by a Court to which the decree had been transferred, a suit was brought to set aside the sale on the ground that the Court from which the transfer had been made had no jurisdiction to grant, as it did, a certificate of non-satisfaction. It appeared that on execution being applied for in the Court to which the decree had been transferred, no objection to the jurisdiction had been raised. *Held*, that the objection, assuming it to be valid, was taken too late, and the sale could not be set aside. *Modun Mohun Ghose Hazra* v. *Boroda Sondori Dasia* 261

——— *Injunction restraining execution proceedings—Relief, General prayer for—Control of execution proceedings—Equity*] To prevent the sale of an estate of which A and B were joint proprietors, for arrears of Government revenue due by B, A borrowed money from C on mortgage of her share and paid off the arrears. A then sued B for contribution but pending the suit default was again made by B and the estate was sold and purchased by D "subject to all encumbrances." A eventually obtained a decree against B, the amount of the decree being declared a charge on the estate sold, which decree she assigned to E, who, after having his name placed in the record, obtained an order for execution of the decree, and attached properties of B other than the estate sold for arrears of revenue In pursuance of an agreement which was then made, E and C, in consideration of a putni at a low rent and without payment of salami granted to C, or to C for himself and E by D, covenanted to release D and the estate purchased by him from all liability in respect of the decree, to entrust to him the whole conduct of the execution proceedings. The agreement contained a proviso that should the Court, in which the decree should be executed, of its own accord, or upon petition of B or his legal representatives, and notwithstanding objections on the part of E and C, make any order for execution of the decree in the first instance against the estate sold and now in the hands of D, then E and C should not be bound by their covenants, and D might cancel the agreement. E subsequently applied for execution against the property of the infant son of B who had meanwhile died, but on an objection being taken it was directed that the decree should first be executed against the property which had been sold for arrears. On appeal, however, this order was set aside—but E abandoned these proceedings, and having transferred the decree to the High Court applied for execution of the decree

Execution—*continued.*

by sale of the family dwelling house left
The widow and infant son thereupon filed
against D, C and E, and after payment
whole amount of the decree held by E, sale
an injunction staying all proceedings until
hearing of the suit in which they prayed,
alia, that they might be allowed to stand
shoes of E and insist upon having the
executed against the estate purchased by D.
that in as much as it appeared that E had
some advantage or benefit out of the lien
by the decree held by him, which benefit
vantage the plaintiffs might be entitled to
valued at the hearing and the value set
the decree, although there was no specific
for such relief in the plaint, the proce
should be stayed. *Kristo Mohini Dasee* v.
Prosunno Ghose ... ...

False Charge before Police. See
CODE, ACT XLV OF 1860, SECTION 21

——— See PENAL CODE, ACT
OF 1860, SECTION 211 ...

——— before Police. See
CODE, ACT XLV OF 1860, SECTION 211

——— See PENAL CODE, ACT
OF 1860, SECTION 211 ...

——— See PENAL CODE, ACT
OF 1860, SECTION 211 ...

——— See PENAL CODE, ACT
OF 1860, SECTION 211 ...

——— Document. See PENAL CODE
XLV OF 1860, SECTIONS 463 AND 464

——— Evidence given before a P
Officer. See PENAL CODE, ACT X
1860, SECTIONS 191 AND 193, ...

——— Evidence. See PENAL CODE
XLV OF 1860, SECTIONS 191 AND 193

——— Information. See PENAL CODE
XLV OF 1860, SECTION 211 ...

Fiduciary Relationship. See MO
... ...

Fieri Facias—*Sheriff, Jurisdiction of.*]
much as since the establishment of the
Court, or at all events since 1865, a w
fieri facias could not run beyond the High C
Original Jurisdiction, a sale in executio
decree by the Mofussil Court of property
Mofussil will pass a good title to the pur
notwithstanding that at the time of sue
the Sheriff was in possession of the pr
under a writ of *fieri facias* issued subseq
1865. *Monomotho Nath Day* v. *G*
Chunder Ghose, 24 W. R. 366. *Grish C*
Das v. *Brojo Jibun Bose* ...

Final Decree. See CIVIL PROCEDURE
ACT X OF 1877, SECTION 13 ...

Forged Document—*Penal Code, Act*
of 1860, *section* 471—*Jury, Charge to*—M

)d—*continued.*
Where the accused were charged under 471 of the Penal Code with having, in brought against them by the vendee of ster to recover possession of certain pro- acquired by her by right of inheritance er father, fraudulently and dishonestly forged document as genuine knowing or reason to believe it to be a forged document ured that the accused were in possession of perty and that the document in question ed to be a deed of gift from their father. proved that the endorsement of registra- ich appeared in the document was a for- In his charge to the Jury the Sessions omitted to deal with the fact of the ac- eing in possession of the property. He ected that, the registration endorsement been proved to be a forgery, it was for the persons to establish the genuineness of the nt. *Held*, that it was not sufficient for the erely to decide on the evidence whether the nt was a forgery, and whether the accused t was a forgery when they used it, but it ther necessary for the Jury to decide : the document had been used fraudu- nd dishonestly. *Held*, also, that the Ses- dge in omitting to deal with the fact of ession of the accused, and in throwing of proving the genuineness of the docu- pon them, had misdirected the Jury. *Kazi* v. *Empress* 542

ry. See PENAL CODE, ACT XLV OF 0, SECTIONS 463 AND 464 ... 572

old Estates of Inheritance. See 78

ench Case Penal Code Act, XLV 60, sections 191 and 193—*False —Alternative Charge—Statements before Criminal Procedure Code Act, X of* 1872, *118 and* 119—*Obligation to state the truth Investigation.* A charge of giving false under section 193 of the Penal Code be sustained in respect of a statement a police officer engaged in making an tion under the provisions of the Code nal Procedure. Sections 118 and 119 of e Code impose no legal obligation on ons examined thereunder to speak the th. v. *Nim Chand Mookerjee*, 20 W. R., nal. *Empress* v. *Mussamut Dabi* and han (F. B.) 300

al Clauses Act, I of 1868, **section** See CIVIL PROCEDURE CODE, ACT X OF ; SECTION 396 415

deed of—*Hibabilawaz—Consideratino Bill of Sale—Registration Act, III of* 17, *cl. (a.)* A *hibabilawaz* although nominal consideration of "a *than* natural love and affection" is mere- gift and as such must be regis- *Mostofa* v. *Goburdhone Mulla*... 441

Gift of Corpus. See HINDU LAW ... 473

——— **income.** See HINDU LAW ... 473

Guardians, acts of binding on Minors. See LIMITATION ACT, XV OF 1877, SECTION 7 306

Guardian of lunatic, Duties of. See ACT XXXV OF 1858 30

Guilty, Plea of, what. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 237 471

Hedaya, Vol. II, p. 334 See MAHOMEDAN LAW 164

Hibabilawaz. See GIFT, DEED OF ... 441

Hindu female's testamentary power over Stridhan. See HINDU LAW ... 304

Hindoo Law—*Adoption by widow, Suit to set aside—Suit by contingent Reversioners to set aside adoption by widow—Procedure.*] A suit to set aside an adoption by a widow can, as a general rule, be maintained only by the presumptive reversionary heir unless such person refuses without sufficient cause to institute proceedings, or has by his own act precluded himself from bringing the action, or is in collusion with the widow or has concurred in the adoption, and therefore, where such a suit is brought by a contingent reversionary heir, the Court must exercise a judicial discretion in determining whether the plaintiff in such a case is entitled to sue, and will in general require the nearer reversioner to be made a party to the suit. *Ram Anand Koer* v. *Court of Wards*... ... ... (P. C.) 381

Hindu Law—*Hindu female's testamentary power over Stridhan—Stridhan—Will—Stridhan invested in land, power of disposition over.*] The testamentary power of a Hindu female over her Stridhan is as absolute as her power of disposition over such property in her lifetime, even when the fund has been derived from her husband and has been invested in immovable property. *Rowvenkata Mahapati* v. *Mohipati Suriah* (P. C.) 304

——— *Inheritance—Adopted son, rights of Inheritance of—Collateral heirs, Rights of adopted son inheriting with—Document, Construction of.*] An adopted son inheriting collaterally along with the collateral heirs is entitled to receive the same share as the other heirs. The Dattaka Chandrika, Sec. V, paras. 24 and 25 cannot be construed as an express text limiting the share of an adopted son inheriting collaterally to half the share taken by the other collateral heirs. In construing a document the situation of the parties and their rights at the time of the execution must be looked at. *Dinonath Mukerji* v. *Gopal Chunder Mukerji* 57

——— ——— *Onus—Alienation by Hindu Widow—Inheritance, Charge by Hindu widow upon —Enquiry as to Necessity—Necessity for alienation by widow.*] In a suit upon a bond or mortgage security executed by a Hindu widow, where it is sought to charge the inheritance after the death

Hindu—*continued.*
of the widow, the plaintiff is bound at least to show the nature of the transaction, and that, in advancing the money, he gave credit, on reasonable grounds after proper enquiry to an assertion that the money secured was wanted for one of the recognised necessities. The principle laid down in *Hunooman Persaud Panday* v. *Mussummut Baboee Munraj Koonwaree*, 6 Moore's I. A., 393 has been applied not only to the case of a manager for an infant, but to alienations by a widow and to transactions by which a father in derogation of the rights of a son under the Mitakshara Law has made alienation of ancestral family estate. *Kamessar Pershad* v. *Ran Bahadur Singh*
(P. C.) 361

——————— *Succession—Elder son of Junior wife—Younger son of Senior wife.*] An elder son born of a fourth wife is entitled to succeed in preference to a younger son of a third wife—even where the first and second wives have died before the marriage of the third wife. The question how far the Institutes of Menu are to be interpreted with the aid of glosses by Commentators of authority discussed. *Pedda Ramappa Nayanwara* v. *Banjari Seshamma Nayanwaru*
(P. C.) 315

——————— *Will, Construction—Void Gifts—Perpetuities—Income, Gift of—Corpus, Gift of—Alienation, Restraint upon—Accumulation.*] A Hindu testator, who died leaving a son by his second wife, four minor sons by his third wife who survived him, by his will dated the 17th Bysack 1260 directed, (1) that the *corpus* of his estate, *viz.*, his houses, zemindaries, talooks and capital employed in his business should remain intact and not liable to alienation or partition, and that his heirs, sons' sons and great-grandsons and so on in succession should enjoy the profits thereof; (2), that the movables might be partitioned if his eldest son by his second wife, and his widow should not live amicably together; (3), that the testator's sons, grandsons, great-grandsons and so on should enjoy the profits of the estate subject, however, to the following other directions in the will, *viz.*, that (*a*) the eldest son should act as manager and shebait without power of alienation and without power to withdraw the capital of the business—and that on his death the eldest male heir for the time being should succeed to the managership and shebaitship; (*b*) that after paying Government revenue, collection charges and repairs, the profits should be divided into two portions, one of six and the other of ten annas; (*c*) that the six annas' portion, which was expressly declared to be sufficient for the purpose, should be devoted to the worship of the idols and the maintenance of the family; (*d*) that if the members of the family should not live together during the minority of the minor sons of the widow, she should receive Rs. 12 per mensem for the maintenance of herself and children, and on attaining majority each son should get the share to which he might be

Hindu—*continued.*
entitled under the will; (*e*) that after de
the expenses of worship the six annas'
should be divided equally among the so
(*f*) that the ten annas' portion of the
should be accumulated so long as the
lived in harmony with the eldest son of th
tor, but that if she did not so live, that
should be divided as follows, *viz.*, $\frac{1}{16}$ to th
son of the testator, and the remaining $\frac{1}{16}$
minor sons of the widow in equal share
lutely, the shares of the minor sons to b
mulated until they attained majority; (4)
the dwelling-houses and gardens shoul
the sons in equal shares without power of
tion, and (5) that the share of an hei
dying without male issue should go to t
(male heirs) existing at the time of hi
The widow of one of the sons of the te
widow brought a suit to have it declar
the will was void, and to obtain possessio
deceased husband's share of the testator'
as upon an intestacy. *Held*, that the att
gift of the income of the six annas' po
the profits was not a good gift of the
there being a clear intention in the will t
gift should be restricted and that there
be no gift of the real estate; that there
intestacy as to the six-anna and ten-an
tions of the profits, but that as to the dw
houses and gardens, there was a valid disp
save as to the restraint imposed as to ali
and partition, in favour of all the sons i
shares. *Held*, further, as to the movabl
although there was no express gift in t
an intention on the part of the testator
the movables to his sons in the shares
in the attempted gift of the ten-anna s
the profits, might be gathered from th
Sonatun Bysack v. *S. N. Jugaut Soondree*
8 Moore, I. A., 66 distinguished; *Chun
Dassi* v *Moti Lall Mullick*, 5 C. L. R., 4
Aushootosh Dutt v. *Doorga Churn Chatt
C. L. R., 296 (S. C.) L. R., 6 I. A., 18
mented on Principles applicable to th
struction of wills discussed. *Sukhmoy
Das* v. *Monohuria Dasia* ...

Hindu widow alienation by. Se
DU LAW ... ...

———————, **Decree against.**
CIVIL PROCEDURE CODE, ACT X o
SEC. 234 ... ...

———————, **Suit by reversio
set aside adoption by.** See
LAW ... ...

**Illustrations in Legislative E
ments, Effect and force of.** S
MITATION ACT, XV OF 1877, SECTION 2
TRATION (b) ...

Income, Gift of. See HINDU LAW

Infant—*Necessaries—Costs of legal pro
on behalf of infant, whether necessaries—
Act, IX of 1872, section 68.*] Where co

—*continued.*
incurred on behalf of an infant in main- r defending a suit in which his property ed, such costs are recoverable as neces- thin the meaning of section 68 of the Act from the infant's estate. *Watkins oo Baboo* 433

r Court. See CONTRACT ACT, IX OF , SECTION 265 329

ance, Charge by Hindu widow n. See HINDU LAW 361

——— Freehold Estates of. See ER 78

——— See HINDU LAW ... 57

tion Restraining Execution ceeding See EXECUTION ... 1

nt Act—*Stat.* 11 *and* 12 *Vict. C.* 112 *idence within Jurisdiction—Jurisdiction of* 1877, *Chap. XX.*] A's zemindary ling house in the District of D having l, he came to Calcutta in May 1880 is family with his relations and filed his n the Court for the relief of Insolvent n July. He remained in a hired house ta till September, when the Court rose ication and returned just before the end ication, having in the interval gone to ict of D to raise funds to carry on his y proceedings. He had no residence ie jurisdiction of the High Court. *Held*, ad no residence within the jurisdiction igh Court within the meaning of Sec Insolvency Act. *Ram Paul Singh, In r of* 14

ncy—*Attachment fore judgment— rder—Official Assignee, priority of, over t before judgment.*] An attachment a suit before judgment cannot have effect y to a Vesting Order vesting the pro- f the judgment-debtor in the Official , before a decree has been obtained in *Anund Chundra Pal* v. *Ranchilal Sarma*, L, 691 explained and distinguished. *In r of Gocool Doss Soonderjee*, 1 Ind Jur. 27, *Bank of Bengal* v. *Newton*, 12 B. L. l, and *Gamble* v. *Bholagir*, 2 Bom. H. 6 followed. *A. B. Miller* v. *Mon Mohun* 213

ient Stamp. See COURT FEES' ACT, OF 1870, SECTION 12 528

t of Members of Mutual Bene- Society. See MUTUAL BENEFIT SO- Y 577

on of testator. See HINDU LAW 473

gation of Charge before Police. PENAL CODE, ACT XLV OF 1860, SECTION 289

urity in Execution Sale. See PROCEDURE CODE, ACT X OF 1877, 274, 287, 290, 295 AND 311 ... 369

Irregularity—*continued.*

——— in making Award. See AWARD 505

"Issue Substantially the same." See EVIDENCE ACT, I OF 1872, SECTIONS 32 AND 33 273

Joinder of Causes of Action. See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 43 297

Joint Decree, execution of. See EXECUTION OF JOINT DECREE 34

Joint Family, Liability of Mahomedan. See MAHOMEDAN JOINT FAMILY ... 378

Judgment, Date of. See LIMITATION UNDER ACT VIII (B. C.) OF 1869. SECTION 58 409

——— Omission by Judge to state reasons for. See SECOND APPEAL ... 597

Jurisdiction of Magistrate. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 530 217

——— See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 530 514

——— of Sheriff. See FIERI FACIAS 4

——— on suits to wind up partnership business. See CONTRACT ACT, IX OF 1872, SECTION 265 329

———, Residence within. See INSOLVENT ACT 14

———. See EXECUTION OF DECREE 261

———. See PARTNERSHIP, SUIT FOR DISSOLUTION OF 115

Jury Charge to. See FORGED DOCUMENT 542

Labourer. See ACT XIII OF 1859, SECTION 2 254

Landlord and Tenant. See Enhancement 508

——— *Tenancy, Right of landlord to determine.*] There is no law in this country which gives anything in the nature of a protected tenure or holding to a person who has occupied homestead land, however, long may have been the period of his possession. *Prosunno Coomaree Debea*, v. *Sheikk Rutton Bepary*, 1 C.I.R., 577, followed. *Tarukpodo Ghosal* v. *Shyama Churn Napit* 50

——— *Title, Denial of Landlord's—Occupancy Right.*] The weight of authority of the decisions of the High Court is in favour of the view that when a tenant directly repudiates the relation of landlord and tenant and sets up an adverse title in himself, the landlord is entitled to take possession irrespective of the period during which the tenant may have been in possession. *Shumsher Ali* v. *Doya Bibi* 150

Land Registration Act, Order under, as to possession. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 530 217

Lapsing order. See ACT VIII (B. C.) OF 1869, SECTIONS 38 AND 40 ... 39

Legal Representative of deceased Judgment-debtor. See CIVIL PROCEDURE CODE ACT, X OF 1877, SECTION 234 1

Liability ratione tenuræ to repair embankments. See RIPARIAN EMBANKMENT 553

"Like Offence" under section 74 of Act VII (B. C.) 1878. See ACT VII (B. C.) OF 1878, SECTIONS 9, 58 AND 74 250

Limitation—Act IX *of* 1871, *Sec.* 1, *Cl.* (*a*) *—Act XV of* 1877—*Repealing words, Act VIII of* 1859, *Sec.* 246.] Clause (*a*), Sec. 1 of Act IX of 1871 has reference only to suits actually instituted before that date. *Joyram Loot* v. *Pani Ram Dhoba* 54

——— Sec. 1, Cl (*a*).

See LIMITATION 54

——— **Act XV of 1877, section 7 and Schedule II, Art. 13**—*Suit by minors—Guardians, Acts of, binding on Minors—Minority, Suits by minors during.*] Certain property having been sold in execution of a decree against the eldest of four brother, two of whom were minors, the second brothers made an application under section 269 of Act VIII of 1859, on the 18th June 1877, claiming on behalf of himself and his minor brothers, 3-4ths of the property which had been taken possession of by the purchaser at the execution sale in question, but his application was dismissed on the 9th November 1877. On the 22nd January 1879, the minors through their mother and guardian filed a suit to recover their shares in the property It was objected that the suit was barred as having been brought more than one year from the date of the order under section 269 of Act VIII of 1859. *Held*, that as the plaintiffs were still minors, no limitation applied to the suit, and that it was within time. *Per Curiam* :—The right to sue is that of minors and can, under section 7 of Act XV of 1877, be exercised by them within a certain time from their attaining majority. The minors are no doubt bound by any act lawfully done on their behalf by a properly appointed guardian, but if they have a right to sue and that right had not been exercised on their behalf by their guardian, it exists until they are qualified to act for themselves. *Sheikh Khoda Bux* v. *Budri Narain Singh* .. 306

——— **section 26 illustration (b)**—*Prescriptive Right—Easements—"Enjoyment of right" "Actual use" "Illustrations in Legislative Enactments, Effect and Force of.*] The plaintiffs having for upwards of 20 years enjoyed the right of passage for their boats over the defendants' land when that land was flooded

Limitation—*continued.*

in the rainy season, the defendant in June l before the rains had commenced. put up obst tions with a view to prevent the exercise of t right. In April 1878 the plaintiffs filed a for the removal of the obstructions and for a claration of their right, but it was objected there had been *no exercise of the right by a user proved to have taken place within 2 years b the institution of the suit.* within the meanin the words of illustration (b) to section 26 of Limitation Act. *Held*, that the illustration lied on could not be allowed to curtail the o nary sense of section 26 of the Limitation to which it was appended. and that under section it was only necessary that the enjoym of the right claimed should have continued within two years before suit. and that it was necessary that there should be *actual user exercise of the right.* The illustration referred which seems to make "enjoyment" equiva to "*actual user*" must be rejected. *Lutchma shad Narain Singh* v. *Tiluckdaree Singh*, 24 R., 295 and *Gopee Chand Setia* v. *Bhoobun M Sen*, 23 W. R., 401 distinguished. *Rajroop* v. *Syud Abdul Hossein*, 7 C. L. R., 529 cons ed. *Koylas Chunder Ghose* v. *Puddo Chung*

——— *Sched Art.* 47—*Criminal Procedure Code, Act X of Chap. XI, Suit to set aside order under.*] XL of Act X of 1872 having been substi for Chap. XXII of Act XXV of 1861, a su set aside an order made in 1875 under Se 530 of the former Act, is governed by the p sions of Art. 17 of Schedule II of Act XV of and not by those of Act IX of 1871. Art. Schedule II of Act XV of 1877 applies bot immovable and movable property. *Ka Chunder Shaha* v. *Jomrudunnissa* ..

——— Sch

Art 64. See EVIDENCE OF CONSIDER OF PROMISSORY NOTE ALIUNDE ..

——— Sect

20 and 22. See PARTIES ..

——— Act, IX of 1871 Sched

II, arts. 141, 142, 143 and 145. DILUVION .. ..

——— Act, XV of 1877, Sched

II, arts. 142 and 143. See DILUVIO

——— sched

II, Arts. 99 and 132. See CONTI TION, SUIT FOR .. .. ..

——— Sched

II, Art. 179 cl. 4.] The application mad ed as a starting for a period of Limitation u 179, cl. 4 of Schedule II of the Limitation XV of 1877, must be an application in ac ance with law that is an application made prescribed period. *Nilmoney Singh Deo* v. *Jeebun Surkel* .. .. ..

ontinued.

——————— See LIMI-
.. .. 54

——————— Sch. II,
78. See PROBATE, APPLICATION FOR
16

——————— *of* 1877, *Schedule II,*
'ervivor—Civil Procedure Code Act X of
:30, 245 *and* 248 *—Act VIII of* 1859,
nd 216*—Scire Facias.*] A decree
obtained in 1864, the first applica-
ecution was made under section 215
of 1859 on the 18th September 1869,
ier was made for a writ of attach-
ıe against the person of the judg-
. On the 15th September 1880
ication was made, under section 230
Civil Procedure Code, Act X of 1877,
n. *Held*, that the order under sec-
Act VIII, which must be assumed
ı on notice, had the effect of reviving
t within the meaning of Article 180,
, of Act XV, of 1877, and that the
was not barred. An order for exe-
the Code of Civil Procedure made
has, on the Original Side of the
the same effect of reviving a judg-
re facias had. Section 230 of Act
ıly applies where the previous appli-
ıecution was actually made under
Aushootosh Dutt v. *Goorga Churn*
.. .. 23

— *Adverse possession—Diluvion—*
resumption of.] Although as a ge-
n suit for possession it lies upon the
) is met with a plea of limitation to
n possession within 12 years from
)n of the suit, yet in cases of proper-
as become incapable of actual and
sion, as where lands have been dilu-
e the title and possession has been
in a certain person up to a particu-
ime, when there has been no trans-
le to a third person, and there is no
possession having so long as actual
sion was possible been exercised by
other than the person having title,
)n of the person having the title
umed to have continued until the
become susceptible of actual visible
Kali Churn Sahu v *The Secretary*
. L. R., 99, *Radha Gobind Roy Saheb*
C. L. R., (P. C.), 364 followed.
it Singh v. *Schoene, Kilburn and Co.,*
90; *Gokool Kristo Sen* v. *David,*
; and *Mahomed Ibrahim* v. *Morri-*
Cal, 36 discussed and distinguish-
Mohun Ghose v. *Mothura Mohun*
.. .. 126

— See ACCOUNT, SUIT AGAINST
.. 285

II, Art.—*continued.*

——————— See ACT VIII (B. C.) OF 1869,
SECS. 5, 27, 28, 29, 30 and 58 .. 16

——————— See MITAKSHARA JOINT FAMILY
423

——————— under Act VIII (B C.)
of 1869, section 58—*Act VIII (B. C.) section*
30—*Judgment date of—Civil Procedure Code, Act*
X of 1877, *section* 210.] In a suit under section
30 of Act VIII (B. C.) of 1869 a decree was on
the 24th January 1876 made by consent for
Rs. 100 payable by seven instalments, the first
commencing in January 1876, and the last in
August 1879—the whole amount to become due
on default in payment of any two consecutive
instalments. None of the instalments were paid.
On the 5th April 1879 an application was made
for execution of the decree. *Held*, by GARTH,
C. J., and MORRIS, *J.*, PRINSEP, *J. dissentiente*,
that the application was not barred. *Per* GARTH,
C. J.:—The reasonable construction of section
58 of Act VIII (B. C) of 1869, and section 210
of Act X of 1877 taken together is this, that the
words "from the date of such judgment" in
section 58 of the former Act should be read as if
they were "from the date when the rent is
adjudged to be payable." *Per* PRINSEP, *J.*:—
The date of a judgment is the date on which it
is delivered. *Guruboolah Sircar* v. *Mohun Lall*
Shaha 409

Lopez's case. See DILUVION .. 90

Loss or non-production by obligee of bond assigned to a third person. See EVIDENCE ACT, I OF 1872, SECTION 65 489

Lost promissory note. See EVIDENCE OF CONSIDERATION FOR PROMISSORY NOTE ALLUNDE 533

Lunatic, custody of—SEE ACT XXXV OF 1858 30

——————— **Duties of Guardian of—**See ACT XXXV OF 1858 30

Magistrate, Complaint before. See PENAL CODE, ACT XLV OF 1860, SECTION 211 255

——————— See PENAL CODE, ACT XLV OF 1860. SECTION 211.. 289

——————— **Duty of, to maintain decree or order of Competent C urt.** See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 530 217

——————— **Jurisdiction of.** See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 530 217

——————— **Preliminary Proceeding before.** See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 530 .. 514

Mahomedan Joint Family—*Necessaries—*
Joint Family, Liability of Mahomedan—Marriage
expenses.] A and B who were Mahomedans

Mahomedan—*continued.*
living joint in food and estate separated in Kartic 1279, and at the time of the separation entered into an agreement that "if claims relating to the joint estate are brought on the ground that they are debts due on account of the time we were joint and living in commensality then I, A and I, B will pay such claims according to what is just in equal shares. If either of us do not pay and one of us shall pay the share of the other, then the person who has paid shall recover from the other the amount he has paid for the other." After the separation a decree was obtained against A for the price of certain clothes supplied to him for his marriage which took place while A and B were joint, and A having paid the amount of this decree sued B for one half of the amount so paid. *Held*, that the debt was not incurred in a matter necessary to the existence of the family but for the individual benefit of A, and that as in a Mahomedan family the individual benefited and not the family, is liable for expenses incurred for the benefit of any particular member, A alone was liable for the debt. *Held*, also, that the agreement had reference only to such claims as the family were jointly liable for. *Alimunnessa Khatun* v. *Hassan Ali* 378

——— ——— **Law**—*Maintenance of Wife—Decree for maintenance of wife.*] In a suit by a Mahomedan woman against her husband for maintenance, the Court, where there has been no previous decree or mutual agreement for maintenance, can only direct maintenance from the date of that decree. *Abdoo Futtah* v. *Zabunnissa Khatun* 242

——— ——— "*Wuqf*"—*Settlement—Sadakah—Hedaya, Vol. II, p.* 334] To constitute a valid wuqf there must be a dedication of the property solely to the worship of God or to religious or charitable purposes. See *Abdul Ganne* v. *Hussen Mirza Rohimtullah*, 10 Bom. H. C. R., 13; 2 Hedaya, 334. *Semble*:—When a settlement under Mahomedan Law is made in favor of a particular person his sons' sons' sons mentioning three generations as long as they may have offspring and then in favor of the poor and needy, such a settlement is only valid as a "wuqf" where the word "sadakah" is used in the deed of settlement. *Mahomed Hamidullah Khan* v. *Budrunnissa Khatun* 164

——— ——— **Right of Creditor of deceased**—*Purchase bonâ fide from heir of deceased Mahomedan.*] The creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bonâ fide* purchaser from his heir. *Syud Bazuyet Hossein* v. *Dooli Chund*, L. R., 5 I. A., 211 followed. *Land Mortgage Bank* v. *Roy Luchmiput Singh* 447

Maintenance of Wife, Decree for. See MAHOMEDAN LAW 242

Majority Act, IX of 1875, section 3. See MINORITY 419

Majority—*continued.*

——— **of Subscribers, Power of to alter rules of Society.** See Mutual Benefit Society 577

Marriage Expenses. See MAHOMEDAN JOINT FAMILY 378

Minor, Enquiry whether it be for benefit of, to set aside Compromise. See COMPROMISE, SUIT TO SET ASIDE .. 109

——— **under Act XI of 1858 at time of Act IX of 1875, coming into force.** See MINORITY 419

Minority—*Act XL of* 1858, *section* 26—*Majority Act IX of* 1875, *section* 3—*Minor under Act XL of* 1858 *at time of Act IX of* 1875 *coming into force—Undue influence—Fiduciary Relationship.*] In a suit in Calcutta against one of the makers of a joint promissory note executed in Calcutta on the 9th June 1877 the defendant who was a Mahomedan pleaded infancy. It appeared that the defendant was born on the 22nd July 1857; that, by an order of a competent Court, dated 6th November 1865 the father of the defendant was, under Act XL of 1858, appointed guardian of his property, portion of which was situated in the mofussil. *Held*, that the effect of the order under Act XL of 1858 was to extend the minority of the defendant to the age of 18 years, and that consequently he was a minor on the 22nd June 1875, when the Indian Majority Act, IX of 1876, came in force, and therefore under section 3 of the latter Act his minority was further extended to the age of 21 years, so that on the date of the execution of the note the defendant was still a minor. A third person who stands in no confidential relation to a grantor or who is under age is not bound in the first instance to show that no undue influence was used. The subject of undue influence considered *Raj Coomar Roy* v. *Alfuzuddin Ahmed* 41

——— **Suit by minors during.** See LIMITATION ACT, XV OF 1877, SECTION 7 .. 30

Misapprehension or mistake by Court and Parties as to material facts See COMPROMISE, SUIT TO SET ASIDE .. 16

Misdirection in Charge to Jury. See FORGED DOCUMENT 64

Misrepresentative. See COMPROMISE, SUIT TO SET ASIDE 16

Mitakshara father having adult son MORTGAGE BY 42

——— **Joint Family**—*Alienation by father for antecedent debt, there being an adult son—Consent.*] In order to secure an antecedent debt which was not shown to have been incurred for immoral purposes, the father of a joint Mitakshara family mortgaged his "proprietory share" in a 2 annas' share in a certain property which he held jointly with his adult son. *Held* that the mortgage must be taken to have included the whole interest of both father and son, as

:shara—*continued.*
e son, if he stood by and allowed the with whom he was dealing to believe he onsenting party, was bound by the mort- *Aproop Tewari* v. *Kaudhjee Sahay* .. 192

——— *Debts—Onus—n as between sons and deceased father*] The fa Mitakshara joint family, against whom upon a bond executed by him, had been l by the defendant, having died after the l property of the family have been at- n execution of the decree, his sons and brought a suit praying for partition as themselves and the deceased father, and claration that on such partition the shares to them were free from liability to satis- ecree held by the defendant. The plain- eged that they had not, and it was not hat they had, received any benefit from sideration upon which the bond was *Held*, that as the plaintiffs had not shown debt was contracted for immoral pur- e whole ancestral property in their hands le to satisfy the decree. *Held*, further, ere could not be such a partition as that for. *Roy Goberdhun Lall* v. *Singessur er* 277

——— *Mortgage by Mi- father having minor son—Decree against ra father in representative capacity—Parmey Decree on Mortgage—Mortgage Decree ution.*] The purchaser at a sale held on September 1881 in execution of a decree rm of a money-decree, obtained upon a e bond executed by the father of a Mi- joint family during the minority of his , having failed to obtain possession of erty mortgaged, brought a suit for pos- and under a decree made in that suit possession in November 1866. In July a wife and son of the judgment-debtor a suit to recover possession from the r of ⅔rds of the property on the ground duction Purchaser was entitled only to of the mortgagor. *Held*, that the suit een brought within 12 years from the date the defendant obtained possession was d by limitation. *Held* also, that there ifference between a money-decree passed nortgage bond and a decree on such a reedy declaring a lien upon the property d and therefore what passed to the r at the execution sale was the interest ortgagor and mortgagee together. *Held*, that in as much as the son having been at the date of the mortgage and of the hereupon, the father must be considered cted as manager, and as such to have d the whole interest of the family, the ust be treated as a decree against the a his representative capacity, and that tiffs had therefore no interest left in the . *Munbasi Koer* v. *Nowruttun Koer* 428

Mitakshara—*continued.*

——— ——— **Suit by members of, in respect of joint business contract.** See PARTIES .. 457

——— ——— **Law Lunatics under.** See ACT XXXV OF 1858 30

Money Decree on Mortgage. See MITAKSHARA JOINT FAMILY 428

Mortgage by Mitakshara, father having adult son. See MITAKSHARA JOINT FAMILY 428

——— **Decree, Execution of.** See EXECUTION OF MORTGAGE DECREE .. 169

——— See MITAKSHARA JOINT FAMILY 428

——— ——— **Lien.** See ATTACHMENT, WHETHER SUBSISTING 157

——— ——— ——— **whether ousted by covenant not to alienate in Bond.** See BOND 454

——— **or sell, Power to.** See ATTORNEY, CONSTRUCTION OF POWER OF .. 443

——— See CIVIL PROCEDURE CODE ACT, X OF 1877, SECTION 313 468

——— See RES JUDICATURE .. 10

——— **Redemption of**—*Costs as between party and party—Practice—Mortgage suit.* In a suit upon a mortgage of certain property, A who had purchased the property in question, subject to the mortgage sued upon, in execution of a decree upon another mortgage, paid off the amount due to the plaintiff for principal and interest, and applied to the Court that he might be made a party, and that upon his paying the plaintiff the costs of the suit to be taxed as between party and party, the plaintiff should be directed to re-convey the property to him free from all encumbrances. *Held*, that the practice was to make the costs in such circumstances payable as between attorney and client, and not as between party and party. *Obhoy Churn Sen* v. *Debendro Nath Mullick* 437

Mutual Benefit Society—*Subscribers, Power of majority of, to alter rules—Majority of Subscribers, Power of, to alter rules of Society—Interest of members of Mutual Benefit Society.*] The U S. F. P. Fund, which was established for the purpose of securing a provision for the widows of children of its subscribers, originally or prior to 1850 was subject to the following rule (33). "That widows being incumbents on the Fund shall be paid their pensions at any place they may desire either monthly, quarterly or half yearly, subject to the usual charges of remittance. The pensions of children being incumbents shall also be so paid and on the same conditions." The subscriptions were and continued to be paid in rupees, and the pensions were calculated in rupees according to certain Tables.

Mortgage—*continued.*
Subscribers, on being admitted, were required "to promise and engage to submit to, and abide by the rules and byelaws of the Institution" rule 22. In 1850 when exchange was about par the old rule (33) was repealed under rule 60 which empowered the majority of the Subscribers to alter or amend any existing rule or practice, and the following rule (41) was substituted for it: "That incumbents on the Fund shall be paid their annuities, in India at par, or, in Europe, at the fixed rate of two shillings on the rupee." On the 1st July 1876 when exchange in remittances from India to England had become adverse, the following rule (50) was passed by a majority of the Subscribers. "That incumbents on the Fund shall be paid their annuities in India in full and incumbents residing in Europe and America may be paid their annuities in London at the rate of exchange fixed for the official year by her Majesty's Secretary of State for such pensions as are payable at the India House in London. Annuities already due or hereafter becoming due on risks accepted before 1st July 1876 shall be payable to incumbents residing in Europe at the fixed rate of two shillings on the rupee." Exchange having continued to decline, on the 22nd May 1880 the Society by the votes of 553 members against 505 passed the following rule: "That annuities already due or becoming due before the 1st of May 1880 on risks accepted before the 1st July 1876 shall be payable to incumbents residing in Europe or America at the fixed rate of two shillings to the rupee; but that all other annuities due or becoming due shall be paid if to incumbents in India, in full, and if to incumbents residing in Europe, in London at the market rate of exchange" The plaintiffs were the widow, the son and daughter of F. who commenced subscribing to the Fund on the 11th November 1871 for the benefit of his widow, on the 18th September 1873 for his son and on the 14th November 1874 for the benefit of his daughter. On the 28th September 1878 F. made a further subscription for an increased benefit for his son. He attended the meeting at which the rule of the 22nd May 1880 was passed but he did not vote with the majority. On the 25th June 1880 he died having up to that date duly paid his subscriptions to the Fund. The plaintiffs who were residing in England now sued for a declaration that they were entitled to be paid their annuities at the rate of two shillings in the rupee notwithstanding the rule of the 22nd May 1880. *Held*, that under Rule 60 the majority of the Society had full power to pass the rule of the 22nd May 1880 so as to affect the nominees of all the existing Subscribers, and that therefore the plaintiffs with respect to their several pensions were bound by the terms of that rule. *Falle* v. *MacEwen* .. 577

Necessaries. See MAHOMEDAN JOINT FAMILY 378

Necessaries what are. See INFANT

Necessity for alienation by Hin widow. See HINDU LAW ..

Non-joinder of plaintiffs in actions contract. See PARTIES .. ..

Non-production by obligee of b assigned to a third person. EVIDENCE ACT, I OF 1872, SECTION 65 ..

Notice of Enhancement. See ENHA MENT .. ..

Objection taken too late. See EXEC OF DECREE .. .. ..

Obligation to state truth. See P CODE, ACT XLV OF 1860, SECTIONS 191 193 .. ..

Obstruction. See CRIMINAL PROCE CODE, ACT X OF 1872, SECTION 521 ..

——— See EASEMENT ..

Occupancy Right. See LANDLORD TENANT .. ..

Offence, Attempt to commit. See P CODE, ACT XLV OF 1860, SECTIONS 463 464 .. ..

Official Assignee, Priority of, over tachment before judgment ..

Omission to sue for entire amount rent due. See CIVIL PROCEDURE ACT X OF 1877, SECTION 43 .. ..

Onus, in Enhancement, suit, when dant alleges portion of the lands to be free .. ..

——— **of proof.** See DILUVION ..

——— ——— See EVIDENCE ..

——— ——— See HINDU LAW ..

——— ——— ——— *Suit for rent—Rent, Pa rate of.*] In a suit to recover arrears of from the defendants who, as ticcadars of plaintiff's share in a certain mouzah, had in possession from 1262 to 1281 without h paid any rent, the plaintiff who claimed a h lee rent at the rate of 9 annas of the crop, pr that in the mouzah in question the ryots rent at that rate. *Held*, that under the cir stances, the *onus* was on the defendants alleged that the proper rate was 8 annas to t their allegation. *Lochun Chowdhry* v. *Singh* .. ..

Onus. See MITAKSHARA JOINT FAMILY ..

Order prohibiting Collection of See PENAL CODE, ACT XLV OF 1860, SE 188 .. ..

Original Document, Search for. EVIDENCE.. .. .. ..

Parent tenure. See ACCRETIONS TO U TENURES .. ..

arties in Representative Character.
See RES JUDICATA 117

——— *Non-joinder of plaintiffs in actions of tract—Adding plaintiffs after suit is barred inst added plaintiffs—Mitakshara joint family, it by, in respect of joint business contract—Co-ntractors, Joinder of, as plaintiffs—Civil Proce-re Code, Act X of* 1877, *section* 31—*Limitation t. XV of* 1877, *sections* 20 *and* 22—"*Prescribed riod.*"] Two of the sons of a joint Mitakshara mily consisting of the father, three sons and widow and sons of a deceased son and carry-g on business in partnership, filed a suit on the th July 1880 upon a hatchitta, dated the 11th cember 1876. No time was fixed for the pay-nt of the money, but the last payment made d entered by the defendant on the hatchitta was ted the 30th July 1877. On the 26th July hen the case came on for hearing it was object-l by the defendant that all the persons who ght to sue were not jointed as plaintiffs. hereupon on the application of the original intiffs, the father and the third son, who were scribed as the surviving partners of the de-sed son, were added as plaintiffs, but not until suit as against them was barred by limitation. *ld*, that the Court had rightly exercised its cretion in adding the 3rd and 4th plaintiff to record although the suit was barred under tion 22 of the Limitation Act as against them: *ld*, also, that the claim of the original plaintiffs likewise barred in as much as they could enforce that claim in conjunction with the r plaintiffs whose rights were barred under tion 22 of the Limitation Act. In actions of tract it is the right of the defendant, if he the objection in proper time, to insist upon ersons with whom he has contracted being d as plaintiffs; and if, after the objection been raised, the plaintiff proceeds with the without taking proper steps to add the person rsons whose non-joinder has been objected nd the Court finds that the objection was founded, the suit must be dismissed. *Boydo-Bag* v. *Grish Chunder Roy*, I. L. R., 3 Cal. nted from. *Held* further, that the suit have been in time if all the plaintiffs had in the first instance. *Per Curiam*:—The "prescribed period" in section 20 of the tion Act mean not the period prescribed payment of the debt but the prescribed pe-limitation. *Tariny Churn Nundy* v. *Shaikh Rahoman*, 2 C. L. R., 346, doubted. There uity but often much injustice in allowing t contractor out of many to sue the nt notwithstanding an objection duly the latter, and the Court has no right to ne co-contractor to recover under such nces, though he may no doubt adjust which he recovers with his co-contractors. ven the members of a joint family, any more may be authorised by the rest to *act* gent or agents in any business transac-

Parties—*continued.*
tion, but when a joint family or any members of it carry on the trade in partnership and contract with the outside public in the course of that trade, they have no greater privileges than any other traders. if they are really partners they must be bound by the same rules for enforcing their contracts in Courts of law as the members of any other partnership. *Ramsebuk* v. *Ram Lall Koondoo* 457

Perpetuities, Rule of. See HINDU LAW 473

Plaintiffs, Adding, after suit is barred against parties added. See PARTIES 457

Parties. See MITAKSHARA JOINT FAMILY 428

Partition as between sons and deceased father. See MITAKSHARA JOINT FAMILY 277

——— *Compensation for Expenditure by certain members of joint family on the joint estate.*] In a suit for partition it appeared that the defendants who were members of a joint family had at their own expense enhanced the value of portion of the lands belonging to the joint estate. *Held*, that the partition should proceed on the basis of each co-sharer having an equal share of similar lands, compensation being allowed to each co-sharer for any private expenditure from which it could be shown the value of the partible property had been increased—and that unless it could be shown that were other lands of similar description out of which the share of the plaintiffs could be made up, the plaintiffs were entitled on paying compensation to the defendants, to portion of the lands, the value of which had been enhanced by the defendants. *Kallian Banerji* v. *Modhusudon Banerji* 259

——— **Decree, Execution of.** See CONTRACT ACT, IX OF 1877, SECTION 396 415

——— **of Portion only of joint property, Suit for**—*Civil Procedure Code, Act X of* 1877, *section* 265—*Revenue-paying lands, Partition of.*] A suit will not lie for partition of portion only of a joint estate. Accordingly when the plaintiff sued for partition of a portion of a joint estate and for khas possession of the share which might on the partition be allotted to him, alleging that he had been deprived of possession of that portion by his co-sharers in collusion with others, it was held the suit would not lie. Although under section 265 of Act X of 1877, a decree may be made for partition of revenue-paying land, yet that decree must be carried into execution solely by the Collector. *Ramjoy Ghose* v. *Ram Runjun Chuckerbatty* 367

Partnership business, Winding up of. See CONTRACT ACT, IX OF 1872, SECTION 265 329

——— *Suit for dissolution of—Jurisdiction—District Court—Contract Act. IX of* 1872 *section* 265.] Section 265 of the Indian Contract

Partnership—*continued.*
Act is merely an enabling section, and does not prevent a plaintiff from suing to wind up a partnership business in any Court, other than a District Court, which has jurisdiction, having regard to the pecuniary value of the suit. *Javali Ramasami* v. *Sathambakam*, I. L. R., 1 Mad., 341 relied on. *Luchmun Lal* v. *Ram Lal* .. 115

Party and Party, Costs as between. See MORTGAGE, REDEMPTION OF .. 437

Passage for Boats. See EASEMENT .. 375

Penal Code. Act XLV of 1860, sections 147 and 324. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 454 .. 389

section 188—*Order prohibiting collection rent—Act X of 1872, section 518.*] In case of a dispute between rival parties as to the payment of rents by tenants, a Magistrate has no power under section 518 of Act X of 1872 to make an order that no rents should be collected until such time as the right and title of both parties should have been established by order of a competent Court, and a conviction under section 188 of the Penal Code for disobeying such an order cannot be sustained. *Prosunno Coomar Chatterjea* v. *The Empress*.. 231

sections 191 and 193—*False Evidence—Alterative Charge—Statements before Police—Criminal Procedure Code, Act X of* 1872, *sections* 118 *and* 119 *—Obligation to state truth—Police Investigation.*] A charge of giving false evidence under section 193 of the Penal Code cannot be sustained in respect of a statement made to a police officer engaged in making an investigation under the provisions of the Code of Criminal Procedure. Sections 118 and 119 of the latter Code impose no legal obligation on the persons examined thereunder to speak the truth. *In the matter of Juggernath Sahai*, 8. C. L. R., 236 and *Reg.* v *Nim Chand Mookerjee*, 20 W. R., 41 overruled. *Empress* v. *Mussamut Dabi* and *Kassim Khan* (F. B.) 300

sections 191 and 193—*False Evidence given before a Police Officer.—Enquiry, Preliminary—Criminal Procedure Code, Act X of* 1872, *section* 119.] Persons giving false answers to questions put by a police officer conducting an enquiry preliminary to a proceeding before a Court of Justice may be convicted of giving false evidence under sections 191 and 193 of the Indian Penal Code. *Reg.* v. *Nim Chand Mookerjee*, 20 W. R. Cr., 41 followed. *Juggernauth Sahai, In the matter of* .. 236

section 211—*Complaint before Magistrate—False Charge before Police—Police Reports—Sanction to prosecute—Procedure.*] A sanction for a prosecution under section 211 of the Indian Penal Code given without all the witnesses whom a complainant wishes to produce being heard in Court is illegal.

Penal Code,—*continued.*
In the matter of Chukradar Potti, 8 C. L. R followed. *Empress* v. *Shibo Bchara*

sectio—*False charge.*] A Station Staff Offic ing neither Magisterial nor Police pow false charge made before him does not c to such a criminal proceeding as is refe in section 211 of the Indian Penal Co "false charge" to make the above section cable must be made to a Court, or to an who has powers to investigate and send i trial. *Jamaria, In the matter of* ..

secti—*False charge before Police—Complaint Magistrate—Police Reports—Procedure.*] a charge made to the police is found body to be false, there being no complain to the Magistrate, it is not necessary t prosecution under section 211 of the Ind nal Code can legally be instituted agai person making the charge, that the charg be first judicially investigated. *In the m Biyogi Bhugut*, 4 C. L. R., 134 distinguishe *press* v. *Salik Roy* .. ..

secti—*False charge—Complaint before Magi Investigation of Charge made before Police Reports—Procedure.*] A charge laid aga tain persons before the police, having b ported false by that body, the person wh the charge, complained to the Magistrate District who directed a fresh inves The charge was again reported false. T plainant thereupon filed a petition in whi leged that the second investigation had properly conducted, and asked that fur dence might be taken by a specified offic further investigation having taken pla complainant was ordered to be prosecute section 211 of the Indian Penal Code and was convicted and sentenced On appe High Court, it was *held*, that the convict illegal in as much as an opportunity had afforded to the accused of producing all dence in support of the charge made by h *sick Lall Mullick*, 7 C. L. R., 582 and *In ter of Biyogi Bhugut*, 4 C. L. R., 134 Per MACLEAN, *J.* :—The proper principl should guide a Magistrate is that if no c is made before him after a reasonable elapsed from the conclusion of a police he would be justified in proceeding a person who has made a complaint to t which has been found to be false; but i plaint is made, that complaint must with judicially. It is unfair even the ceed against the complainant without any witnesses whom he may wish to *Chukradar Potti, In the matter of*

sect—*False charge—criminal proceedings,*

Code,—*continued.*
spicion, Statement to Police of.] A statenade to the police of a suspicion that a lar person had committed an offence is "charge" within the meaning of section the Indian Penal Code, nor does it amount institution of a criminal proceeding, and rson making the statement cannot, on the on being proved to be unfounded, be conunder that section. *Bramanund Bhutta-In the matter of* 283

——————— section 211 *charge—Procedure—Enquiry by Police e Report on charge made before Magistrate.*] plaint having been made before a Magishat officer, under section 146 of the Code ninal Procedure directed an enquiry to be y the Police and on such enquiry being was reported to the Magistrate that the was false. Thereupon sanction to prosete complainant was granted under section the Penal Code. *Held,* that in as much Magistrate on receipt of the Police report given the complainant an opportunity of ntantiating the complaint, the Court had er to sanction the prosecution. *Empress mdad,* I L R., 6 Cal., 496 (S. C.) 7 C. L. and *Syud Nissar Hossen* v. *Ram Golam* 25 W R. Cr., 10 followed. *Sakhina Bibi, atter of* 387

Code Act, XLV of 1860 section *False information*] Section 201 of the ode is not intended to apply to the case rson, who appears to be the possible or e offender, making statements exculpating by inculpating another *Behala Bibi, In er of* 207

——————— section 211. CRIMINAL PROCEDURE CODE, ACT X OF 72, SECTIONS 147 AND 470 267

——————— section *Distraint—Act VIII (B. C) of* 1869, *sec-* Persons removing property under the ns of the Rent Law relating to distraint not to be proceeded against under the l Law, but the parties aggrieved by a l distraint should have recourse to the provided by Act VIII (B. C.) of 1869 *Aghori, In the matter of* 204

——————— sections nd 464—*Forgery—Attempt to commit Preparation for commission of offence—ment—Attempt to commit an offence*] h constitutes a false document within g of sections 463 and 464 of the nal Code is not the writing of any words which in themselves are innofixing the seal or signature of some to the document with a knowledge l or signature is not his, and that he rity to affix it. A person, therefore, orders for the printing of certain

Penal Code—*continued.*
receipt forms similar to those formerly used by certain Company and corrected the proofs of the same, it being his intention to use the receipt forms in order to commit a fraud, cannot be convicted of forgery until one of the printed forms has been converted by him into a false document, nor of an attempt to commit forgery until he had done some act towards making one of the forms a false document. Until a form had been converted into a false document all that was done consisted in mere preparation for the commission of an offence. An attempt to commit an offence must be to do that which if successful would amount to the offence charged. *Per* GARTH, *C. J* :—The fact that the word "make," is used in section 464 of the Penal Code in conjunction with the words "sign," "seal," or "execute" clearly denotes that the making of a document does not mean writing or printing it, but signing or otherwise executing it. *Reasat Ali, In the matter of* 572

——————— section 471. See FORGED DOCUMENT .. 542

Performance of Contract, Time for. See CONTRACT, SUIT FOR BREACH OF .. 294

Penalty under Recognizance Bond, Remission of. See RECOGNIZANCE 72

Perjury in respect of evidence in a Civil Court—*Evidence Act, I of* 1872, *section* 91—*Deposition of witness Civil Procedure Code, Act X of* 1877, *sections* 182 *and* 183—*Admissibility of deposition of witness in trial against him for perjury*] The deposition of a witness in a Civil suit taken down in a language other than that in which the evidence was given is not admissible in evidence in a prosecution against him for perjury in respect of the statements made by him, unless the provisions of sections 182 and 183 of the Civil Procedure Code, Act X of 1877, have been complied with. *Mayadeb Gossami, In the matter of* 292

Perjury. See PENAL CODE, ACT XLV OF 1860 SECTIONS 191 AND 193 300

Plea of Guilty to be recorded. See CRIMINAL PROCEDURE CODE, ACT X OF 1872 SECTION 237 471

Police, False Charge before. See PENAL CODE, ACT XLV OF 1860, SECTION 211 255

——— Investigations. See PENAL CODE, ACT XLV OF 1860, SECTIONS 191 AND 193 300

——— Officer, False Evidence given before. See PENAL CODE, ACT XLV OF 1860, SECTIONS 191 AND 193 263

——— Report on charge made before Magistrate. See PENAL CODE, ACT XLV OF 1860, SECTION 211 387

Police, Reports, Incorporation of in proceeding recorded under section 530 of Act X of 1872, by the Magistrate. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 530 .. 245

——— See PENAL CODE, ACT XLV OF 1860, SECTION 211 265

——— See PENAL CODE, ACT XLV OF 1860, SECTION 211 255

——— See PENAL CODE, ACT XLV OF 1860, SECTION 211 289

Possession, Adverse. See DILUVION.. 90

——— See LIMITATION 126

——— **Continuance of.** See DILUVION 90

——— **Constructive.** See DILUVION 90

——— **Presumption of.** See LIMITATION 126

——— See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 530.. .. 245

Power of Attorney, Construction of. See ATTORNEY, CONSTRUCTION OF POWER OF 443

Proctice as to Costs. See MORTGAGE, REDEMPTION OF 437

——— See ACT XXXV OF 1858 .. 30

——— See CONTRIBUTION, SUIT FOR .. 209

Preliminary Proceeding before Magistrate. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 532 .. 511

Preparation for Commission of offence. See PENAL CODE, ACT XLV OF 1860, SECTIONS 463 AND 464 572

"Prescribed period" in section 20 of Act XV of 1877. See PARTIES .. 457

Prescriptive Right. See LIMITATION ACT, XV OF 1877, SECTION 26 ILLUSTRATED (B) 281

Presidency Magistrates' Act, IV of 1875, section 12. See ACT VIII (B.C.) OF 1878, SECTIONS 9, 58 AND 74 .. 250

——— **Act, IV of 1877, sections 32 and 124.** See DISMISSAL OF COMPLAINT 106

Previous Conviction under Excise Act. See ACT VII (B. C.) OF 1878, SECTIONS 9, 58 AND 74 250

Priority. See ATTACHMENT, WHETHER SUBSISTING 157

——— See REGULATION VIII OF 1819, SECTION 17, CL. 5 341

——— See RES JUDICATURE .. 10

Privy Council Cases Evidence—*Burden of Proof—Estoppel—Conduct of parties—Registration in Collectorate.*] In a suit to recover possession of certain land and houses in which the plaintiffs rested their claims on the allegation that when the succession opened out they were seventh in degree, whereas the defendants were eighth in degree from a common ancestor and were entitled to no part of the property, it appeared that immediately after the opening out of the succession, the plaintiffs had treated the defendants as having equal rights with themselves and as being in an equal relationship to the common ancestor and had permitted their names to be registered as such in the collectorate books. *Held*, (affirming the decree of the High Court at Allahabad) that the course of conduct of the plaintiffs although not amounting to an estoppel in point of law threw the burden upon them of proving the allegation on which they rested their claim. *Agrawal Singh* v. *Poujdar Singh* .. 346

2——— *Secondary Evidence of Deed—Original Deed, Search for.*] In a suit to recover a share of joint family property, the defendants relied upon a deed of *Anumati patro*, alleged to have been executed in 1826 by the ancestor of the joint family, distributing the property in a manner different from that in which it would have been distributed by law. This deed had been filed in proceedings in 1832, 1837 on behalf of a member of the familiy, and again in 1857 on behalf of A, one of the defendants in the suit. It appeared that the original deed was, in 1857, given back to A's mukhtear on his receipt. Secondary evidence was given of the deed, but there was nothing to show that any endeavour had been made to obtain the original from the custody of A's mukhtear. *Held*, (affirming the decision of the High Court) that the original deed had not been sufficiently accounted for, and that therefore secondary evidence of its contents was inadmissible. *Bhoobuneswari Debi* v. *Hurri Sarun Surma Mutro* 337

3——— **Hindu Law**—*Adoption by widow, Suit to set aside—Suit by contingent Reversioners to set aside adoption by widow—Procedure.*] A suit to set aside an adoption by a widow can, as a general rule, be maintained only by the presumptive reversionary heir unless such person refuses without sufficient cause to institute proceedings, or has by his own act precluded himself from bringing the action, or is in collusion with the widow or has concurred in the adoption, and therefore, where such a suit is brought by a contingent reversionary heir, the Court must exercise a judicial discretion in determining whether the plaintiff in such a case is entitled to sue, and will in general require the nearer reversioner to be made party to the suit. *Anund Koer* v. *Court of Wards* 331

4——— *Hindu female's testamentary power over Stridhan—Stridhan—Will—Stridhan invested in land, power of*

Council Cases—*continued.*
over.] The testamentary power of a male over her Stridhan is as absolute as r of disposition over such property in me, even when the fund has been derived husband and has been invested in im- property. *Rowvenkata Mahapati* v. *Suriah* 304

——— ——— *Onus—*
n by Hindu Widow—Inheritance, Charge widow upon—Enquiry as to Necessity—for alienation by widow] In a suit upon r mortgage security executed by a Hindu where it is sought to charge the inheri- ter the death of the widow, the plaintiff at last to show the nature of the trans- nd that. in advancing the money, he dit, on reasonable grounds after proper to an assertion that the money securred ted for one of the recognised necessities. rinciple laid down in *Hanooman Persaud v. Mussummut Baboee Munraj Koonwaree,* s I. A., 393 has been applied not only se of a manager for an infant, but to ns by a widow and to transactions by father in derogation of the rights of a r the Mitakshara Law has made aliena- the family estate. *Kamessar Pershad Bahadur Singh,* 361

——— ——— *Succes-*
der son of Junior wife—Younger son of ife.] An elder son born of a fourth wife d to succeed in preference to a younger third wife—even where the first and rives have died before the marriage of wife. The question how far the Insti- Menu are to be interpreted with the aid s by Commentators of authority dis- *Pedda Ramappa Nayanwara* v. *Banjuri Nayanwaru* 315

application for—Limitation Act XV Schedule II article 178] No law of limi- verns applications for probate. *Gobind Gossami* v, *Rungun Money Dossee,* R., 345. *Ishan Chundur Roy. In the* 52

— See Succession, Act X of 1865, ions 3 and 256 397

— See Will 287

ture in Suits to set aside adop- n by Hindu widow. See Hindu 381

— See Civil Court, Order by, un- section 471 of Criminal Procedure 148

— See Criminal Procedure Code, X of 1872, section 521 ... 399

— See Criminal Procedure Code, of 1872, sections 521 and 525 431

Procedure See Penal Code, Act XLV of 1860, section 211 255

——— See Penal Code, Act XLV of 1860, section 211 ... 265

——— See Penal Code, Act XLV of 1880, section 211 289

——— See Penal Codt, Act X of 1860, section 211 387

——— **to enhance rent after Suspension of Decree for enhanced rent in former suit.** See Enhancement of Rent 161

——— **under sec. 38 of Act VIII (B C.) of 1869.** See Act VIII (B. C.) of 1869, sections 38 and 40 ... 39

——— **when accused desires to recall and cross-examine witnesses of prosecution.** See Criminal Code, Act X of 1872, section 215 ... 325

Proceeding to be recorded under section 530 of Act X of 1872. See Criminal Procedure Code, Act X of 1872, section 530 245

Proclamation to specify amount of incumbrance. See Civil Procedure Code, Act X of 1877, sections 274, 287, 290, 295 and 311 369

Produce, Enhancement of Rent on ground of increased value of. See Second Appeal 449

Proof of title by person claiming as collateral heir See Succession by Collateral Heir 238

——— **Onus of.** See Diluvion ... 70

Proper rent. See Arrears of Rent, Suit for 320

Prosecution, Sanction for, under section 470 of Act X of 1872. See Criminal Procedure Code, Act X of 1872, sections 147 and 470 267

Prosecute. Sanction to. See Penal Code, Act XLV of 1860, section 211 ... 265

Public Liability to Repair Embankments. See Riparian Embankment 553

Purchase *bond fide* **for heir of deceased Mahomedan.** See Mamomedan, Right of Creditor of deceased 447

Putni. Sale of, for arrears of rent. See Regulation VIII of 1819, section 17 cl. 5 341

Reasonable Cause. See Civil Procedure Code, Act X of 1877, section 558 ... 350

Recission of Contract in part impossible of performance. See Specific Relief Act, I of 1877, section 40 ... 501

Recognizance—*Criminal Procedure Code, Act X of* 1872, *section* 489—*Penalty under Recognizance bond, Remission of*] Where the penalty under a recognizance bond has been forfeited, neither the Magistrate nor the High Court has power to reduce the amount of the penalty. *Naki Hazi, In the matter of* 72

Redemption of Mortgage, Costs of See MORTGAGE 437

Reference. See ARBITRATORS, APPLICATION BY, FOR SANCTION OF COURT AS TO COSTS 439

——— **under Regulation III of 1872, section 5, Appeal for order upon.** See SONTHAL REGULATION III OF 1872, SECTION 5 548

Refusal to summon witnesses. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTION 359 70

Registration Act III of 1877, section 17 cl. (a). See GIFT, DEED OF ... 441

——— ——— **in Collectorate.** See EVIDENCE ... ... 34[illegible]

Regulation VIII of 1819, section 17 cl. 5—*Sale of putni for arrears of rent—Durputni, Decree for compensation for loss of, by sale of putni—Attachment of surplus sale proceeds—Priority.*] The plaintiff having obtained a decree upon a mortgage of a putni tenure, the tenure was, on the default of the putnidar sold for arrears of rent, and the surplus proceeds after satisfying the superior landlord's claim were at once attached in execution of the decree. Within two months, however, of the sale, but subsequently to the attachment, the durputnidar whose tenure had been destroyed under cl. 4 of section 17 of Regulation VIII of 1819, sued the putnidar for compensation for the loss and obtained a decree which was directed to be paid out of the surplus proceeds. The amount of the decree having been paid as directed, the plaintiff filed the present suit to recover the amount so paid, on the ground that as his attachment was prior to the suit of the durputnidar, he was entitled, to the whole of the surplus proceeds, which did not cover his decree to the exclusion of the durputnidar. *Held*, that as a claim to the surplus proceeds could only be put forward by a *regular suit* under cl. 5 of section 17 of Regulation VIII of 1819, the attachment of the plaintiff was not sufficient and the plaintiff was therefore not entitled to succeed. *Surnomoyi Dassia* v. *Land Mortgage Bank* 341

——— ——— **XI of 1825, section 4, cl. 1.** See ACCRETIONS TO UNDER-TENURES ... 517

——— ——— **III of 1872, section 5.** See SONTHAL REGULATION, III OF 1872, SECTION 5 548

Relief, general prayer for. See EXECUTION 43

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—— **Execution of Decree for by [illegible] of under-tenure.** See ACT VIII (B[illegible] OF 1869, SECTIONS 61 AND 64... ...

—— **payable for previous year.** ARREARS OF RENT, SUIT FOR .. ...

—— **Proof of Rate of.** See *Onus* OF P[illegible]

—— **Suit, execution of decree in.** ACT VIII (B. C) OF 1869, SECTIONS [illegible] 28, 29, 30 AND 58 .. ...

—— **Suit for Share of**—*Co-sharers, Sui[illegible] rent by one of several.*] The plaintiff's co-sh[illegible] in a certain mouzah, the rents of which collected jointly, having dismissed the agen[illegible] whom the joint collections were made, and pointed a new agent, the plaintiff refus[illegible] recognise the new agent, and gave notice to ryots not to pay her share of the rent to The ryots thereupon withheld payment o[illegible] share altogether, and the plaintiff ther[illegible] brought a suit to compel the payment of it. that the suit would not lie. *Sheikh Gasi Mah[illegible]* v. *Moran*, 2 C. L. R., 370. *Jadu Shaui* v. *Ka[illegible] bini Dassi* ... ...

Repairing of riparian Embankme[illegible] See RIPARIAN EMBANKMENT ..

Repealing words of Statute. See [illegible] TATION ... ...

Representative capacity, De[illegible] against Mitakshara father in ——— ——— **Character, Parties** See RES JUDICATA ... ...

Representators of deceased judgm[illegible] debtor. See CIVIL PROCEDURE CODE, X OF 1877, SECTION 234 ...

Residence within Jurisdiction. See SOLVENT ACT ... ...

Res Judicata—*Act VIII of* 1859, *sec.* 7—*Priority—Mortgage—Civil Procedure Code X of* 1877, *sec.* 13 *Expl*] In execution of [illegible] cree obtained by the plaintiff, in September upon a mortgage, dated 8th March 1872, i[illegible] objected by A that the property attache[illegible] been purchased by him on the 1st August in execution of a decree, dated 30th Dece[illegible] 1871. The objection having, on the 10th [illegible] 1875, been allowed and the attachment [illegible] drawn, the plaintiff in 1876 brought a su[illegible] set aside the order of 10th April 1875, bu[illegible] suit failed on the ground that the property not included in the mortgage. On the February 1871, prior to any attachment original mortgagor had executed a mortga[illegible] the same property and upon this mortgage cree had on the 28th February 1871 been o[illegible]

Tudicata—*continued.*
hich decree had been transferred to the
ff, who attached the property. This at-
nt was also set aside by an order, dated
arch 1876 on the objection of A. The
ff thereupon sued to set aside the order of
arch 1876, and to have it declared that the
aged property in the hands of A was sub-
his decree of 28th February 1871. *Held*,
although the subject matter of both suits
e same, the present suit was not by reason
previous suit in 1876 barred under section
Act VIII of 1859 nor by section 7 of the
Act. *Held*, also, that the purchase by A in
as subject to the mortgage of 14th Feb-
1871. *Denobundhoo Chowdhry* v. *Kristo-*
e Dossee, I. L. R., 2 Cal. 152 distinguished
soondary Chowdhrain v. *Punchanun Chow-*
. L. R., 3 Cal. 705 commented on. *Ra-*
h Kundu v. *Land Mortgage Bank of India* 10

——— *Civil Procedure Code, Act X of*
ection 13 *and section* 244 *(c)—Parties in re-*
ative character—Admission.] A suit having
brought against the widow and heiress of
ised Hindu upon a mortgage executed by
respect of certain property left by her
sband, the defendant died and upon her
he sisters of the husband were, on the ap-
on of the plaintiff, substituted as parties
record. The substituted defendants de-
hat they were heirs of the widow, and
g the property as heirs of the husband
d that the property was not chargeable
e widow's debt, in as much as it was a
l debt incurred without legal necessity.
urt having refused to adjudicate on the
a raised by them, and having made a de-
e same objections were raised in the
ings in execution, but not decided, and
t, title and interest of the mortgagee was
execution of the decree. In a suit by the
the husband to have it declared that they
ntitled to have the property freed from
rtgage executed by the widow, it was
l that the matter was *res judicata*, in as
s the question as to the right of the plain-
laim the property as heirs of the husband
o have been decided in the former suit, or
l, (c) section 244 of the Civil Procedure
the execution proceedings. *Held*, that
ituted defendants in the former suit the
plaintiffs were not parties for all purposes
suit within the meaning of the Civil
re Code, and it was necessary to decide
stions raised by them in the execution
ng or in the former suit. *Held*, also, on
, that the widow had no power to bind
band's estate, and therefore nothing passed
rchaser of the right, title and interest
execution sale. Where parties allow a
e conducted in the lower Courts, as if a
r fact were admitted they cannot after-
appeal question that fact and recede

Res Judicata—*continued.*
from the tacit admission. *Kanailal Khan* v. *Shoshi Bhooshun Biswas* 117

Res Judicata. See ARREARS OF RENT, SUIT OF, ... 310

——— See CIVIL PROCEDURE CODE, ACT X OF 1879, SECTION 12 113

——— See CIVIL PROCEDURE CODE ACT X OF 1877, SECTION 13, EXPL. II... 393

Revenue paying lands, Partition of. See PARTITION OF PORTION ONLY OF JOINT PROPERTY, SUIT FOR 367

Reversioner Suit by Contingent, to set aside adoption. See HINDU LAW 381

Revivor. See LIMITATION ACT, XV OF 1877, SCHED. II, ART. 180 28

Right of way for boats. See EASEMENT 375

Riparian Embankments—*Embankment, Nature of obligation of zemindars to repair—Liability to repair embankments ratione tenuræ—Public Liability to repair—Act VI (B. C) of* 1873.] The villages of B and R which were contiguous, the former being to the North of the other, both fronted a river on the same side. There was a marginal embankment of the river frontage to keep out floods, but on the southern boundary of R there was a side embankment running inland from the marginal embankment. This side embankment having been breached, the flood passing through R inundated and caused damage to B. The plaintiff who was the putnidar of B sued the zemindars in whose zemindary R was situate to recover the damage, on the ground that the damage had been caused by the defendant's neglect to keep, as he alleged it was their duty, the embankments in proper repair. The defendants by their kabuliut, dated 30th May 1794 under which they held their zemindary from Government covenanted "to do embankment works at the proper time and to bear any loss caused by negligence in respect thereof," and also to pay full rent notwithstanding drought or inundation. The defendants admitted that under a subsequent agreement with the Government they were in receipt of an annual sum, as a contribution for the repair of embankments in their zemindary, but the agreement was not produced. It did not appear whether the particular embankment which has been breached was affected by the agreement, nor was there sufficient evidence to show from what time the embankment had been in existence. There was no evidence of prescriptive right. *Held*, (1) that under the Common Law of this country there was no liability cast upon a riparian proprietor to construct artificial works or keep them in repair. cf. *Hudson* v. *Tabor*, L. R., 2 Q. B. D., 290. (2) that if the embankment in question had been in existence when the kabuliut was executed, the defendants might be liable thereunder on the principle of the case of the

Riparian Embankments—*continued.*
Mayor of Lyme Regis v. *Henby*, 2 Cl. and Fin., 331, and (3) that if the agreement under which the Government contribution for the repair of embankments was made was not for the sole benefit of the zemindars, but was intended to impose an obligation of public and general concern upon them, and it applied to the particular embankment and the inundation had been caused by the defendants' neglect, the plaintiff, would be entitled to succeed on the principle of the case of the *Mayor* of *Lyme Regis* v. *Henby*, 2 Cl. and Fin., 331. The case was remanded to take evidence as to the nature of the agreement. History of the law relating to embankments in India discussed. *Nuffer Chunder Bhutto* v. *Jotendra Mohun Tagore* 553

Sadakah. See MAHOMEDAN LAW ... 164

Saleable interest. See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 313 ... 946

Sale in Execution, Application to set aside. See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 313 468

——————— of severel decrees See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTIONS 274, 287, 290, 295 AND 311 ... 369

—— of putni for arrears of rent. See REGULATION VIII OF 1819, SECTION 17, cl. 5 841

—— of Under-tenure. See ACT VIII (B C.) OF 1869, SECTIONS 59 AND 60 ... 498

—— Procedure. See ACT VIII (B. C.) OF 1869 498

Sanction of Court to compromise, on behalf of infant. See COMPROMISE, SUIT TO SET ASIDE 169

——————— to prosecute. See PENAL CODE, ACT XLV OF 1860, SECTION 211 ... 265

——————————— under section 470 of Act X of 1872. See CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTIONS 147 AND 470 267

Satisfaction of decrees rateably. See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTIONS 274, 287, 290, 295 AND 311 ... 369

Scire facias. See LIMITATION ACT, XV OF 1877, SCHED. II, ART. 180 23

Search for original Document. See EVIDENCE 337

Second Appeal—*Civil Procedure Code, Act X of 1877, section 578—Judgment, Omission by Judge to state reasons for—Error of law.*] In a suit to recover possession of certain immovable property alleged to have been purchased by the plaintiff from a Hindu widow who claimed to have held the same as heir of her husband, the defendant who was the mother of the husband contended, *inter alia*, that the alleged purchase and

Second Appeal—*continued.*
sale were invalid by reason that she herse entitled to maintenance out of the property. first Court gave the plaintiff a decree an decree was affirmed on appeal by the D Judge, who however gave no reasons of hi for his judgment but merely adopted those Lower Court. *Held*, that having regard t nature of the case and the simplicity of the for determination, the fact of the District J having omitted to state his reasons di l not am to such an error of law within the meanin section 578 of the Code of Civil Proced affected the merits of the case or the juris of the Court. *Rohimoni Dabi* v. *Zami uddi*

——————— *Evidence, Improper re for disbelieving—Civil Procedure Code, Act* 1877, *section* 585—*Enhancement of rent on gr of increase in value of produce—Evidence of holders as to increased value of produce in suit enhancement.*] In a suit for enhancement of on the ground that the value of produce ha creased, the evidence of holders of land i neighbourhood as to the prices at which have sold their crops from year to year is rel and ought to be considered, and not reject favour of evidence of traders and merchant speak to the prices obtained in hâts and and other places of trade. Where the Court has omitted to consider, or has giv erroneous or improper reason for disbelievi setting aside as of no value, relevant ev upon the essential question in a case, the Court in second appeal is competent to int *Musst. Degumber Dassee* v. *Kissen Dhur* Ind. Jur. 35; *Gunee Biswas* v. *Sree Gopal dhry*, 8 W. R., 395; *Ram Das Saha* v. *Mon Dasi*, 7 B. L. R. App. 4; *Ghundhabun Mo Shurut Chunder Roy*, 23 W. R., 160 an *Narainee Koer* v. *Ressae Tewari*, 24 W. R referred to. *Huropershâd Roy Chowdhry* v *tara Dabi* ... .

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Sheriff, Jurisdiction of. See FIERI F

Sonthal Regulation, III of 1872 tion 5—*Reference under Regulation III o section 59—Appeal from Order upon—Se Officers, Jurisdiction of—Settlement cases—*

nthal Regulation—*continued.*
t XXXVII of 1855, *section* 2, *Officers appointed under.*] Under the notification of the nant-Governor of Bengal, dated 7th May which is still in force, the proper Officers rtain and adjudicate upon suits for land Sonthal Pergunnahs, and to certify issues Civil Court under section 5 of Regulation f 1872 are not Settlement Officers as such, fficers appointed under section 2 of Act VIII of 1855. Accordingly a Civil Court Sonthal Pergunnahs has no jurisdiction issues sent to him by a Settlement Officer. e, however, it appeared that a Deputy missioner to whom issues had been so referred rial was also invested with the powers of a ment Officer, it was held that the proceed- taken before him might be regarded as settlement proceedings which he as a ment Officer was competent to deal with lf. The High Court has no jurisdiction to an appeal from any order made by a Settle- Officer in the Sonthal Pergunnahs as such. *Tarini Prosad Misser* v. *Mahommed Chowdhry*, L. R., 555. *Tarini Prosad Misser* v. *Hurrish der Chowdhry* 548

cific Relief Act, I of 1877, section —*Contract Act, IX of* 1872, *section* 56—*Rescis- of Contract in part impossible of performance oid Contract—Cancellation of Contract, Con- , Partial, Cancellation of.*] The plaintiff, had contracted with the defendant to grow o for nine years on lands A and B, having four years after the commencement of the act ousted from the first named lands, gh no neglect or omission on his own part, der a decree for ejectment obtained against mediate landlord under section 52 of Act (B C.) of 1869, sued to have the contract ded so far as it had become impossible by of the events which had happened. *Held*, although under section 56 of the Contract he plaintiff was not strictly speaking en- to sue for rescission of the Contract, yet section 40 of the Specific Relief Act he ntitled to have the contract cancelled so far related to the growing of indigo on land A. *Pershad Singh* v. *W. Campbell* ... 501

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Succession Act, X of 1865, sections 3 and 256—*Probate—Executors—Administration Bond.*] Under section 256 of the Succession Act not only administrators, but also executors are liable to give a bond to the District Court for the due collection of, getting in and administering the estate of the deceased. See Probate and Administration Act, V of 1881, section 78. *Juggodishari Dabi, In the matter of* ... 397

——— Act, IX of 1865, section 4. See DOWER 78

———Act, X of 1865, section 254. See WILL 287

——— "*Adoption.*"] S, who had two brothers, the defendant and R, died in 1862 leaving two sons who died before 1867, and a widow to whom he by will granted a power to adopt a son. In 1867 C, the widow of R died childless, and, no son having yet been adopted by the widow of S, the defendant took possession of all the property left by C, as her sole heir. It appeared that the defendant had by suppressing the will of S containing the permission to adopt and by putting forward a spurious will, fraudulently prevented the widow of S, in spite of repeated endeavours to do so, from adopting a son in the lifetime of C, and that it was not until 1874, after the High Court had declared her power under her husband's will to adopt a son, that she had succeeded in adopting a boy who, it appeared, was not born until after C's death. The boy so adopted then brought this suit in 1877 to recover from the defendant an eight annas' share of the estate left by C, claiming it as the adopted son of S. *Held*, that the estate of C having once vested in possession in the defendant as the heir of C could not now be divested in favour of a person who by reason of a subsequent adoption had become an heir of C. *Held*, also that as the fraud committed by the defendant in preventing the adoption of a son by the widow of S was of too remote a character so far as it affected plaintiff for the Court to disturb the estate which had vested in the defendant. *Nilcomul Lahiri* v. *Jotendro Mohun Lahiri* ... 401

——— **by collateral heir**—*Proof of title by person claiming as collateral heir.*] Where a plaintiff brings a suit as a collateral heir, he is bound to allege and prove his title through the common ancestor in all its stages. *Kedarnath Doss* v. *Protab Chunder Doss* 238

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——— **Gift.** See HINDU LAW

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——— *Probate—Succession Act (X of section 254.]* Upon a *bonâ fide* applicatic probate of a will, it is not the province Court to which the application is made into questions with reference to the power testator to make a disposition of the pr of which the will purports to dispose. *Lall Sandyal* v. *Juggo Mohun Gossain*, I. 4 Cal. 1 (S. C.) 2 C. L. R., 422, followed; *Lochun Dutt* v *Nilrutton Nundi*, I. L. R. 360, (S. C.) 4 C. L. R., 175, comments *Nanhu Koer* v. *Somirun Thakur* ...

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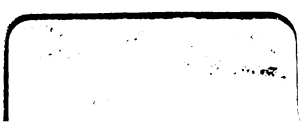
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